No. 76-1193

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER"

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

CITATIONS

229-559—77——1

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand (App. A, *infra*) is not yet reported. The original opinion of the court of appeals (App. B, *infra*) is reported at 531 F. 2d 87. The opinion of the district court (App. E, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976. On January 21, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including February 28,

1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals possesses and should exercise supervisory power to suppress a defendant's allegedly perjurious grand jury testimony for the sole reason that the prosecutor neglected to follow the usual practice of other federal prosecutors in the circuit of giving "target warnings" to grand jury witnesses against whom the government has incriminating evidence.

STATEMENT

1. During May 1973, in the course of her employment by a debt collection agency, respondent made numerous telephone calls to various relatives of a delinquent gambling debtor she was attempting to locate.[1] Without her knowledge the debtor's brother tape-recorded a call during which she allegedly threatened the debtor with physical harm if he did not pay up (App. B, *infra*, p. 16A). On September 13, 1973, agents of the Federal Bureau of Investigation, after giving respondent full *Miranda* warnings and observing her sign a waiver of rights form, questioned her about the call. They did not tell her that it had been recorded, and she denied making any threats (*id.* at 16A–17A).

[1] See page D-27 of the Appendix to the government's brief in the court of appeals. Appendices D and E of that document consist of the Grand Jury Minutes of respondent's testimony. Further reference to that testimony will be designated "Grand Jury Minutes—." We are lodging a copy of the Appendix with the Clerk of this Court.

Some nine months later the government subpoenaed respondent to appear before a grand jury sitting in the Eastern District of New York and there questioned her about her employer's business in general and the role she played in it. Again she was not told about the recording (*id.* at 17A). She denied unequivocally having made certain statements that the government attorney read to her from a transcript of the recorded

NOTE: Reference to Footnote [1] on Following Page.

[1] Respondent often identified herself over the telephone as "Mrs. Kramer" (Grand Jury Minutes D–2). The pertinent testimony was as follows (*id.* at D–39 to D–41):

Q. I'm going to read some direct quotes to you, Mrs. Jacobs, and I want to know whether or not you said them!

"Mrs. KRAMER. Well, you know what's going to happen to him one of these days.

BILL. Well, he's going to die ["he" refers to the debtor, who by then was known to be suffering from leukemia] and now that's besides the point.

Mrs. KRAMER. Sooner than he expects.

BILL. No, I don't.

Mrs. KRAMER. Sooner than he expects. Maybe it's going to be painful to be honest with you."

A. I never said that.

Q. Are you absolutely positive that you never said that!

A. Absolutely positive.

Q. Now, you're under oath—

A. I never said that.

Q. You never said to anyone these words, "Maybe it's going to be painful, to be honest with you."

A. I never said it. I know I'm under oath.

Q. Now, did you know the statute of perjury!

A. Yes. I never said that.

Q. We'll continue.

"BILL. Well, you know it's got nothing to do with me.

Mrs. KRAMER. I mean it's really a shame, but he's gonna get his pretty soon, just a matter of hours to be honest with you and as

conversation,[3] and the grand jury indicted her for perjury[4] (*ibid.*).

Prior to her grand jury testimony the government had advised respondent of her Fifth Amendment privilege against self-incrimination and told her that she had a right to have counsel of her choice outside the grand jury room and to consult with him or her at any time (Grand Jury Minutes D–3 to D–4; App. E, *infra*, pp. 27A–28A, n. 2). She had not been given the full litany of *Miranda* warnings to which individuals facing custodial interrogation are entitled,[4] nor had she been told that she was a "target" of the grand jury investigation subject to indictment. She had been advised, however, that perjury was a serious offense (*ibid.*), and before testifying she had sworn that her testimony would be truthful (Grand Jury Minutes D–2).

I told you, I'm being honest with you. We didn't like going to the mother, but we will.

BILL. Well, you know."

Q. (continuing) Do you recognize those words?

A. Not exactly.

Q. You had some sort of conversation?

A. By the way of saying I wish you could contact your brother.

Q. Did you say, "What's he's going to get his pretty soon"?

A. I did not.

Q. You absolutely deny that statement?

A. Yes. I deny it.

[3] Respondent was also indicted for transmitting in interstate commerce a threat to injure, in violation of 18 U.S.C. 875(c). That count is not involved here.

[4] The government had not told respondent either that she had a right to remain silent before the grand jury or that counsel would be provided for her if she were unable to bear the expense herself. Respondent was unrepresented at the time of her testimony; she stated that she was not in need of counsel (Grand Jury Minutes D–4; App. E, *infra*, pp. 27A–28A, n. 2), and she was advised that she could stop the grand jury proceedings to consult with counsel whenever she wanted (*ibid.*).

2. Before trial, respondent moved to suppress her grand jury testimony on the ground that the government's warnings to her had been inadequate. The district court granted the motion, relying on *United States* v. *Mandujano*, 496 F.2d 1050 (C.A. 5), reversed, 425 U.S. 564, and *United States* v. *Washington*, 328 A.2d 98 (D.C. Ct. App.), certiorari granted, 426 U.S. 905, argued December 6, 1976 (No. 74–1106). The court ruled that the government's questioning of respondent, without first giving her full *Miranda* warnings and advising her that she was a "putative defendant," was "so 'offensive to the common fundamental ideas of fairness' as to amount to a denial of due process" (App. E, *infra*, p. 31A). Without her grand jury testimony the government was unable to prosecute the perjury charge, and the district court accordingly dismissed it (*id.* at 31A–32A).

The court of appeals affirmed, although for different reasons. It expressly declined to reach the constitutional issues that had been argued both in the district court and on appeal (App. B, *infra*, pp. 19A, 21A), and ruled instead, "solely under our supervisory power" (*id.* at 22A), that suppression was necessary because the government's failure to give a "target warning" in this case departed from prevailing, circuit-wide prosecutorial practice and created what the court believed to be an intolerable lack of "uniformity

in criminal procedure within the circuit" (*ibid.*).[5] In the court's view (*id.* at 21A), the government's conduct in this case, "if not in actual violation of the Constitution, is, at least, outside the penumbra of fair play."

3. On November 1, 1976, this Court granted the government's petition for a writ of certiorari (No. 75–1883), vacated the judgment of the court of appeals, and remanded for reconsideration in light of the intervening decision in *United States* v. *Mandujano*, *supra*.

On remand, the court of appeals adhered to its decision. It said (App. A, *infra*, pp. 3A–4A) that it had anticipated (and agreed with) this Court's ruling in *Mandujano* and that its own ruling had not been based on constitutional grounds, but on its conception of its "duty to avoid uneven justice in the circuit, resulting from [the government's] mere negligence or inattention to established practice and guidelines" (*id.* at 6A).[6] The court acknowledged (*ibid.*) that the government could legitimately achieve uniformity by adopting a practice of never giving target warnings in any case, but it determined (*ibid.*) that, since "the policy of the various prosecutors should be uniform," and since "[i]t is an important function of the administration of criminal justice to let our citizens know that equal justice is available to all" (*ibid.*), the "sanction of suppression is salutary in the circumstances" (*id.* at 8A). The court further explained (*id.* at 13A) that it was imposing that sanction for a "didactic purpose," and to prevent "chaos in criminal law administration through the presence in the same district of a two-headed prosecution branch operating on conflicting procedures" (*id.* at 12A). The sanction was especially appropriate, in the court's view (*id.* at 7A), because respondent remained subject to prosecution for the substantive offense (see note 3, *supra*); in these circumstances the government "was [not] entitled to the luxury of a perjury count" (*id.* at 7A).

In addition, the court of appeals rejected the government's arguments that its exercise of supervisory powers to suppress respondent's testimony (1) was barred by 18 U.S.C. 3501(a) or Rule 402 of the Federal Rules of Evidence, and (2) conflicted with decisions of the Third Circuit regarding the effect of

[5] Upon learning that the government attorney who had questioned respondent before the grand jury—a "Strike Force" attorney—had not told her that she was a "target" of the investigation, the court had directed its clerk to poll the six United States Attorneys in the Second Circuit to learn their practice in this regard. Each replied that they customarily warn grand jury witnesses who are "putative defendants" of their status. This survey indicated to the court that respondent would have been warned that she was a "putative defendant" if she had been subpoenaed by the United States Attorney, yet "the Strike Force operating in the same district failed to give her such warning" (App. B, *infra*, p. 21A).

[6] The guidelines to which the court referred are those promulgated by the Attorney General to govern the relationship between Strike Force attorneys (who operate under a commission from the Attorney General issued pursuant to 28 U.S.C. 515(a)) and United States Attorneys. Those guidelines provide generally that in grand jury proceedings the former "shall * * * operate under the direction of the" latter (see Office of the Attorney General, Order No. 431–70, reprinted in *In re Persico*, 522 F.2d 41, 68–71 (C.A. 2)). The guidelines do not require (or even mention) target warnings.

Section 3501(a) on appellate courts' supervisory powers (*id.* at 10A–12A).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the nature and scope of the federal courts' supervisory function. In our view the court of appeals in this case has exercised powers that it does not possess.[1] In so doing it has rendered a decision that produces a result forbidden by Congress and that conflicts with the decisions of another court of appeals.

Even without regard to the controlling legislation, however, the court's exercise of supervisory powers to suppress respondent's allegedly perjurious testimony raises grave questions, since none of her rights was violated either by the failure to give her a "target warning" (as the court itself recognized) or by the Strike Force attorney's departure from prevailing prosecutorial practices. There was no "unequal justice" in this case—the government's conduct observed all constitutional and statutory standards—and the courts are not at liberty to excuse violations of the criminal law because of displeasure over lawful governmental practices.

1. The power of the judiciary to formulate and apply rules of evidence is subordinate to the paramount authority of Congress, within constitutional limita-

[1] The court of appeals has in reality exercised two different kinds of power in reaching its decision in this case. The first is a power to regulate the conduct of government attorneys before the grand jury, the second a power to punish what it perceives as undesirable conduct by means of the suppression of a defendant's statements and—since in this case those statements constitute the *corpus delecti* of the alleged offense—by precluding the government from prosecuting a crime. In this petition we principally question the latter exercise of power.

tions, to declare what practices and procedures will govern trials in the federal courts. *E.g., Gordon* v. *United States,* 344 U.S. 414, 418; *Funk* v. *United States,* 290 U.S. 371, 382, 383. The principle was stated expressly in *Palermo* v. *United States,* 360 U.S. 343, 353, n. 11: "The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." See also *McNabb* v. *United States,* 318 U.S. 332, 341, n. 6.

We submit that two Acts of Congress stand in the way of the court of appeals' exercise of its claimed supervisory power[2] to suppress respondent's grand jury testimony in this case:

a. Section 3501(a) of Title 18 provides that in any criminal prosecution a confession, which is defined to include "any self-incriminating statement" (Section 3501(e)), "*shall* be admissible in evidence if it is voluntarily given" (emphasis added). The court of appeals ruled that this provision was inapplicable because, in its view (App. A, *infra,* pp. 10A–11A), respondent's perjurious denial of the threatening telephone call was not a "confession" or a "self-incriminating statement." But Section 3501 was enacted in response to this Court's decision in *Miranda* v. *Arizona,* 384 U.S. 436, which held that, absent

[2] The supervisory powers possessed by the lower federal courts can surely be no broader than the rulemaking authority of this Court, and no less subject to congressional limitation.

effective warnings regarding the Fifth Amendment privilege against self-incrimination, any statements made by an accused during custodial interrogation would be inadmissible at trial and (*id.* at 477) that "no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" The Court explained that "statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and * * * are incriminating in any meaningful sense of the word" (*ibid.*).

Had respondent's denial been given in response to custodial interrogation not preceded by the required warnings, it would have been excludable under *Miranda*. There is no reason why the very same statement should be considered "self-incriminating" for purposes of *Miranda*'s exclusionary rule but not "self-incriminating" for purposes of Section 3501's rule of admissibility.* Thus, absent a determination that re-

* Respondent's denials of guilt were not only perjurious but also evidence of her guilt on the substantive count, since false exculpatory statements are circumstantial evidence of guilty consciousness. See, *e.g.*, *United States* v. *Kahan*, 415 U.S. 239; *Wilson* v. *United States*, 162 U.S. 613, 620–621; *United States* v. *Parness*, 503 F. 2d 430, 438 (C.A. 2), certiorari denied, 419 U.S. 1105; *United States* v. *Merrill*, 484 F. 2d 168, 170 (C.A. 8), certiorari denied, 414 U.S. 1077; *United States* v. *Tager*, 481 F. 2d 97, 100 (C.A. 10), certiorari denied, 415 U.S. 914; *United States* v. *Lompres*, 474 F. 2d 860, 863 (C.A. 7), certiorari denied, 411 U.S. 965. If—as we think is clear—those statements would therefore be admissible as part of the government's proof of the substantive count, then we submit that they would be admissible on the perjury count as well.

spondent's testimony was not voluntarily given, Section 3501 governs, and the court of appeals had no power—supervisory or otherwise—to suppress it."

b. Rule 402 of the Federal Rules of Evidence also restricts the courts' supervisory power to exclude evidence." That rule provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

The legislative history of this provision shows that Congress chose its language with care: relevant evidence is to be excluded solely in those cases where exclusion is mandated "by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court *pur-*

" The court of appeals noted (App. A, infra, p. 11A) that Section 3501(b) instructs the district court in determining voluntariness to consider all of the circumstances surrounding the giving of any statement by the defendant, including whether the defendant at the time "knew the nature of the offense with which he was charged or * * * suspected." The court then said (*ibid.*): "There is no evidence that Mrs. Jacobs had such knowledge." We take this remark to be something other than a ruling by the court that respondent's allegedly perjurious denial was involuntary. Whether she knew the nature of the offenses of which she was suspected, and what effect the state of her knowledge may have had on the voluntariness of her grand jury testimony, were factual issues that were not raised or passed upon by the district court and that the court of appeals presumably was not attempting to resolve in the first instance.

" The Federal Rules of Evidence are an Act of Congress. Pub. L. 93–595, 88 Stat. 1926.

suant to statutory authority" (emphasis supplied).[12] See H.R. Rep. No. 93–650, 93d Cong., 1st Sess. (1973). Having strictly limited this Court's ability to fashion rules excluding otherwise relevant evidence, Congress plainly could not have intended to allow the courts of appeals an unfettered supervisory power to achieve the same result.[13]

In short, Section 3501(a) and Rule 402 strictly limit the circumstances under which relevant, voluntary statements made by a defendant (or anyone else) may be suppressed, leaving no room whatever for the exercise of inconsistent supervisory powers by the federal courts. In suppressing respondent's grand jury testimony without first finding a violation of the Constitution, an Act of Congress, or a rule formulated

[12] For example, under 18 U.S.C. 3771–3772, empowering this Court to promulgate the Federal Rules of Criminal Procedure.

[13] The court of appeals ruled that Section 402 does not preclude its result on the ground that it bars only "common law rules of evidence or state rules of evidence, if inconsistent [with the federal rules]" (App. A, *infra*, p. 11A) and was not addressed to inconsistent rules of evidence formulated by the courts of appeals acting pursuant to supervisory powers. The court did not explain the basis for this conclusion, and we submit that its reading of the rule is unpersuasive given the express restriction of this Court's power to act other than "pursuant to statutory authority."

The court of appeals was encouraged in its interpretation by the government's failure to present "history to support the view that Congress [in passing Section 402] was concerning itself with the supervisory powers of the federal courts" (*ibid.*), but no such history was needed in light of the plain language of the statute. In any event, we disagree with the court of appeals' implicit conclusion that, unless Congress clearly manifests an intent to restrict or nullify judicial supervisory powers, any statute that it passes to govern criminal practice in the federal courts can be disregarded in favor of an inconsistent exercise of such powers.

by this Court under its rulemaking authority, the court of appeals has acted pursuant to supervisory powers that it does not possess. The propriety of that action merits review by this Court.

2. Moreover, by invoking the court's supervisory powers and ignoring the directive contained in 18 U.S.C. 3501(a), the decision below conflicts with two decisions of the Third Circuit. In *United States* v. *Crook*, 502 F. 2d 1378 (C.A. 3), certiorari denied, 419 U.S. 1123, the court held that a defendant's voluntary waiver of counsel prior to questioning by federal agents who knew he was represented by counsel on pending, unrelated charges did not contravene *Massiah* v. *United States*, 377 U.S. 201. The court then considered and rejected the possible exercise of its supervisory powers to create a rule that would adopt the prohibition against interrogating a defendant in the absence of his counsel contained in the American Bar Association's Code of Professional Responsibility (DR 7–104(A)(1) (Final Draft, 1969)). The court noted (502 F. 2d at 1380) that the Code provisions were enforceable "only under our supervisory powers," which are "subject to the control of Congress." Since Congress had decreed that voluntary confessions shall be admitted, the court recognized its lack of authority to formulate an inconsistent evidentiary rule. "We cannot," said the court (*id.* at 1381), "in exercising merely supervisory powers, disregard the congressional mandate of 18 U.S.C. § 3501(a)."

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The court below attempted to distinguish *Crook* on the ground that the Third Circuit's holding that the defendant's constitutional rights had not been violated made the subsequent discussion of Section 3501 and its relation to judicial supervisory powers mere dictum (App. A, *infra*, pp. 11A–12A). But the court's description of *Crook* only highlights its resemblance to this case, where the court also found that respondent's statements were secured without violation of any of her constitutional rights. The court below further distinguished *Crook* as involving "a real 'confession' " (*id.* at 12A), but, as we have shown above, the distinction between inculpatory and facially exculpatory incriminating statements is one without a difference for purposes of Section 3501.

In *United States* v. *DiGilio*, 538 F. 2d 972, 985 (C.A. 3), the court ruled that the government had misused a grand jury subpoena to facilitate investigatory interrogation of the defendant outside the grand jury's presence, but that under Section 3501 it "lacked any supervisory authority to suppress" the defendant's statements unless they were given involuntarily. This case was sought to be distinguished by the court below on the sole ground (App. A, *infra*, p. 12A n. 12) that it "involved no question of whether defendants are treated differently by the Strike Force than the normal practice would require." [14] In our view the two courts' conflicting views regarding Section 3501's impact on supervisory powers cannot be explained on the basis of so irrelevant a factual difference between the cases.

[14] We find it hard to imagine how "normal practice" would not preclude the abuse of grand jury process found to have occurred in *DiGilio*.

3. Even had Congress not spoken on the evidentiary issues, grave questions would attend the court of appeals' exercise of its supervisory power in this case to immunize a defendant from liability for acts made criminal by statute. In *Lopez* v. *United States*, 373 U.S. 427, 440 (decided prior to enactment of both statutes discussed above), this Court observed that a court's supervisory power "to refuse to receive material evidence is a power that must be sparingly exercised." In that case—as in this one—there was "no manifestly improper conduct by federal officials," and the Court ruled that the exercise of its supervisory powers to suppress the defendant's testimony "would be wholly unwarranted." The Court continued (*ibid.*):

> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

See also *United States* v. *Grimes*, 438 F.2d 391, 395 (C.A. 6), certiorari denied, 402 U.S. 989; *United States* v. *Jones*, 433 F.2d 1176, 1181–1182 (C.A.D.C.),

certiorari denied, 402 U.S. 950; *United States* v. *Quarles,* 387 F.2d 551, 555–556 (C.A. 4), certiorari denied, 391 U.S. 922.

In the present case the court below acknowledged (App. A, *infra,* p. 4A) that the government's failure to warn respondent that she was a "putative defendant" did not violate her constitutional rights, and it did not consider whether any other of respondent's rights, statutory or court-announced, was violated. Rather, the court ruled that the simple lack of uniformity in prosecutorial practice created by the Strike Force attorney's failure to advise respondent of her status required the sanction of suppression and dismissal of the perjury count. In so ruling, the court has set a precedent of large dimensions and launched itself into the supervision of an area that has heretofore been left to self-regulation by the Executive Branch.

Nonuniformity in prosecutorial practice—provided it offends no statutory or constitutional proscription—has never, to our knowledge, been held a sufficient cause to terminate a criminal prosecution. The Executive Branch has broad discretion to carry out its constitutional mandate to "take Care that the Laws be faithfully executed" (United States Constitution, Art. II, Sec. 3). See *United States* v. *Nixon,* 418 U.S. 683, 693; *United States* v. *Cox,* 342 F. 2d 167, 171 (C.A. 5), certiorari denied *sub nom. Cox* v. *Hauberg,* 381 U.S. 935. This discretion embraces such vital matters as plea bargaining, sentencing recommendations, grants of testimonial immunity, and even the

selective enforcement of criminal laws, so long as the prosecutor's decisionmaking is not based upon impermissible standards "such as race, religion, or other arbitrary classification." *Oyler* v. *Boles,* 368 U.S. 448, 456; see also *Washington* v. *United States,* 401 F. 2d 915, 924–925 (C.A.D.C.). Put simply and in contrast to the court of appeals' view, uniformity in prosecutorial procedure is *not* generally "a fundamental of the administration of criminal justice" (App. B, *infra,* p. 22A), especially when its absence results in no prejudice to the rights of the defendant. See *Inmates of Attica Correctional Facility* v. *Rockefeller,* 477 F. 2d 375 (C.A. 2); *Newman* v. *United States,* 382 F. 2d 479, 480 (C.A.D.C.).

It makes no difference that the lack of uniformity here was caused by the Strike Force attorney's failure to follow a general policy already in existence.[15] The nonobservance of a discernible governmental standard that is intended to govern prosecutorial decisionmaking at any of the numerous stages of the criminal process where discretion must be exercised does not warrant dismissal of a prosecution if none of the defendant's rights has been violated. See *Sullivan* v. *United States,* 348 U.S. 170, 173–174; *United States* v. *Leonard,* 524 F. 2d 1076, 1088–1089 (C.A. 2); *United*

[15] Although each of the United States Attorneys in the Second Circuit appears to follow a practice of warning "putative defendants" of their status, and although in most cases most United States Attorneys apparently give such warnings, no governing Department of Justice policy exists and apparently the practice varies even within some United States Attorneys' offices.

States v. *Hutul,* 416 F. 2d 607, 626–627 (C.A. 7), certiorari denied, 396 U.S. 1012.[16]

There is no suggestion here that the prosecutor's decision not to warn respondent that she was a target of the grand jury investigation resulted from discriminatory or otherwise impermissible motives. There has been "no manifestly improper conduct by federal officials" (*Lopez* v. *United States, supra,* 373 U.S. at 440) in this case, and no right of respondent's has been abridged. Yet the court of appeals in effect has pardoned petitioner, acting out of an abstract interest in uniformity of prosecutorial performance and in plain disregard of this Court's twice-repeated caution (given in the context of entrapment cases but no less applicable here) that the federal judiciary does not sit to exercise "a 'chancellor's foot' veto over law enforcement practices of which it d[oes] not approve" (*Hampton* v. *United States,* 425 U.S. 484, 490 (plurality opinion), quoting from *United States* v. *Russell,* 411 U.S. 423, 435).

4. Even if the decision below does not conflict with the constitutional ruling in *United States* v. *Mandujano,* 425 U.S. 564, it nevertheless disregards

[16] The contrary result reached by the decisions below is not, however, without support. See *United States* v. *Caceres,* 545 F. 2d 1182 (C.A. 9); *United States* v. *Leahey,* 434 F. 2d 7 (C.A. 1); *United States* v. *Heffner,* 420 F. 2d 809 (C.A. 4); *United States* v. *Sourapas,* 515 F. 2d 295 (C.A. 9). The United States is now preparing a petition for a writ of certiorari to review the decision in *Caceres, supra.*

the principles underlying that decision." All eight Justices who voted in *Mandujano* agreed that, whatever warnings regarding the constitutional privilege against self-incrimination might be required to be given to "putative defendants" in general, the absence of warnings was immaterial in a perjury prosecution because "'[o]ur legal system provides methods for challenging the Government's right to ask questions—lying is not one of them'" (plurality opinion, *id.* at 577; concurring opinion of Mr. Justice Brennan, *id.* at 585; concurring opinion of Mr. Justice Stewart, *id.* at 609; quoting from *Bryson* v. *United States,* 396 U.S. 64, 72). In suppressing respondent's testimony, the court below has overridden the policies that sustained the prosecutions in cases such as *Bryson* and *Mandujano.* Cf. *Lego* v. *Twomey,* 404 U.S. 477, 488, n.16. Since the complete absence of "puta-

[17] Because this case involves a perjury prosecution, it is distinguishable from *United States* v. *Washington,* No. 74–1106, argued December 6, 1976, where the court of appeals affirmed suppression of the defendant's grand jury testimony in his prosecution for the substantive offense that was the subject of the grand jury investigation. Accordingly, even were this Court to reverse in *Washington,* that could not sustain the decision here.

This case also differs from *Washington* because here the court of appeals affirmed the dismissal of the indictment "to encourage uniformity of practice" (App. A, *infra,* p. 3A) and "for the limited purpose of preventing chaos in criminal law administration through the presence in the same district of a two-headed prosecution branch operating on conflicting procedures" (*id.* at 12A), whereas in *Washington* the court ruled that target warnings are constitutionally required by the Fifth Amendment self-incrimination clause.

tive defendant" warnings would not defeat a perjury prosecution even if it had violated the defendant's constitutional rights, a different result can hardly be justified simply because lack of the warnings in a particular case contrasts with the normal policy of the prosecutor's office.[18]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1977.

[18] We note also that even if the court of appeals' concern for the lack of uniformity in prosecutorial practice were well founded, the adoption of an exclusionary rule to suppress the testimony here and to compel future uniformity would nonetheless be unwarranted for the reasons stated in our brief in *Mandujano*, No. 74–754 (pp. 56–57). If the court wishes to announce rules to govern the conduct of prosecutors, it should do so prospectively and should look first to direct discipline of errant prosecutors for enforcement of such rules, rather than to the exclusion of relevant evidence and the dismissal of prosecutions.

APPENDIX A

United States Court of Appeals For the Second Circuit

No. 581—September Term, 1976

(Argued November 22, 1976. Decided December 30, 1976.)

Docket No. 75-1319

UNITED STATES OF AMERICA, APPELLANT
v.
ESTELLE JACOBS a/k/a "Mrs. Kramer,"
DEFENDANT-APPELLEE

Before: FEINBERG, GURFEIN AND VAN GRAAFEILAND, Circuit Judges

On remand from the Supreme Court, the Court of Appeals reexamined its previous opinion, reported at 531 F. 2d 87, in light of *United States* v. *Mandujano*, 96 S. Ct. 1768 (1976). The Court reaffirmed its holding that the grand jury testimony of defendant who had not been warned she was a "target" of the investigation should be suppressed and the perjury count upon which that testimony was based dismissed. The Court held that this decision was based solely upon its supervisory powers to insure the consistent administration of criminal justice within the Circuit and was limited to the particular circumstances in this action where the Strike Force attorney deviated from the practice of the United States Attorney in that District.

229-559—77——4

Edward R. Korman, Chief Assistant United States Attorney, Eastern District of New York (David G. Trager, United States Attorney for the Eastern District of New York, of counsel), *for Appellant U.S.A.*

Irving P. Seidman, New York, N.Y. (Rubin, Seidman & Dochter, New York, N.Y., of counsel), *for Defendant-Appellee.*

GURFEIN, *Circuit Judge:* This appeal is before us again on a remand, at the suggestion of the Solicitor General, "for further consideration in light of *United States* v. *Mandujano* [96 S. Ct. 1768 (1976)]." 45 U.S.L.W. 3327–28.[1] This affords us an opportunity to explicate our previous opinion, *United States* v. *Jacobs,* 531 F. 2d 87.[2] In that opinion we affirmed the dismissal of a perjury count against defendant Jacobs, the necessary predicate of which was her testimony before the grand jury, which we held had been properly suppressed in the circumstances.

When we filed our decision, the Supreme Court had not yet reversed the Fifth Circuit in *Mandujano,* 496 F. 2d 1050 (5th Cir. 1974), the authority relied upon by the District Court in our case. But the Supreme Court had already granted certiorari.

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[1] Mr. Justice Stewart and Mr. Justice Marshall each wrote dissenting opinions. Mr. Justice Stewart also concurred in Mr. Justice Marshall's opinion as did Mr. Justice Brennan. Mr. Justice Stevens concurred in the decision to remand for clarification of one point.

[2] Because we were exercising supervisory power, contrary to our usual practice, the opinion was circulated before filing to all active and senior judges of the circuit. Four active judges, in addition to the panel, indicated agreement in written memorandum. One active judge was away and did not respond. Only one active judge would have voted to reverse. No senior judge suggested reversal. Two senior judges wrote memoranda, one indicating agreement, and the other concurring in the result. We did not mention this originally because we deemed it an internal matter.

Although perhaps it could have been made clearer in our previous opinion, the justices who dissented on the remand were correct in surmising that we intended to make explicit in our opinion that we were familiar with the Fifth Circuit opinion in *Mandujano,* and that we were unwilling to acquiesce in it on constitutional grounds. We did not purport to establish a continuing requirement, but to impose a one-time sanction to encourage uniformity of practice (whatever the practice might be) between the Strike Force and the United States Attorney in the *same* district. We refused to affirm the District Court on the basis of the *constitutional doctrine* of *Mandujano* which it had accepted as correct. In that sense we may be said to have anticipated the decision of the Supreme Court, now called to our attention on remand.

In this circuit the thrust of the case law, from a constitutional point of view, has been more akin to the Supreme Court's subsequent decision in *Mandujano* than to the decision of the Fifth Circuit. *E.g., United States* v. *Del Toro,* 513 F. 2d 656, 664 (2d Cir.), *cert. denied,* 423 U.S. 826 (1975). In *Jacobs,* we noted, however, that in *Del Toro* and in a series of similar cases, the defendant had, in practice, always been warned that he was a target of the investigation.[3] That this has been the uniform practice of prosecutors in our

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[3] *See, e.g., United States* v. *Bonacorsa,* 528 F. 2d 1218, 1223 (2d Cir. 1976) (appeal from E.D.N.Y.); *United States* v. *Del Toro,* 513 F. 2d 656, 660 (2d Cir. 1975); *United States* v. *Corallo,* 413 F. 2d 1306, 1328, 1329, n.6 (2d Cir.), *cert. denied,* 396 U.S. 958 (1969); *United States* v. *Capaldo,* 402 F. 2d 821 (2d Cir. 1968); *United States* v. *Irwin,* 354 F. 2d 192, 199 (1965) *cert. denied,* 383 U.S. 967 (1966); *United States* v. *Winter,* 348 F. 2d 204, 205–06 (2d Cir.), *cert. denied,* 382 U.S. 955 (1965). *Cf. United States* v. *Scully,* 225 F. 2d 113, 116 (2d Cir.), *cert denied,* 350 U.S. 897 (1953).

circuit, for much longer than twenty years, was perceptively observed by Judge Medina in *United States* v. *Scully*, 225 F. 2d 113, 116 (2d Cir. 1955). Since the Strike Force prosecutor failed to give such warning, we were unable on this appeal to distinguish the Fifth Circuit opinion in *Mandujano*, as we were able to do in *United States* v. *Bonacorsa*, 528 F. 2d 1218, 1223 (2d Cir. 1976), a decision in which two members of the *Jacobs* panel, Judges Feinberg and Van Graafeiland concurred.

While we did not think the warning to be necessary on *Miranda* grounds, we also did not believe that because an omission by a prosecutor is within constitutional limits, he *must* necessarily omit that which he is constitutionally permitted to omit. What the Constitution does not require it does not necessarily forbid.

Surprised, as we were, to find that what we had thought to be a common practice of prosecutors in the circuit for more than twenty years was not followed, we canvassed each of the United States Attorneys in the circuit for their practice in this regard. We were informed that every United States Attorney, in practice, warns the potential defendant that he is a target of the investigation. The appeal before us involved a prosecution by the Strike Force in the Eastern District of New York as authorized by 28 U.S.C. § 515.

The Strike Force, consisting of special attorneys appointed by the Attorney General, operates theoretically under the supervision of the United States Attorney. 28 U.S.C. § 543.[4] *See In re Subpoena of*

[4] Section 543 applies to "special attorneys" appointed to appear before the grand jury, § 515(a); Assistant United States Attorneys are appointed under § 542.

Persico, 522 F. 2d 41, 56 (2d Cir. 1975). (For instance, in this appeal the Strike Force filed papers under the name of the United States Attorney for the Eastern District of New York.) The Attorney General has promulgated guidelines "governing interrelationships between Strike Forces and United States Attorneys' Offices."[5] The Guidelines provide that "[w]hen a specific investigation has progressed to the point where there is to be a presentation for an indictment, the Chief of the Strike Force shall then for this purpose operate under the direction of the United States Attorney who shall oversee the judicial phase of the development of the case."

Though we did not think it necessary to spell it out in our earlier opinion, we think that this prescribed direction by the United States Attorney applies to this case. As we noted, "[operation] under the direction of the United States Attorney * * * should have been assumed by the Strike Force." 531 F. 2d at 90, n.6.

We did not specifically refer to the analogy of an agency being required to adhere to its own regulations, *Service* v. *Dulles*, 354 U.S. 363, 732 (1957), because we recognized that the Attorney General in his prosecutorial function may be, strictly speaking, less restricted than the Secretary of State. However, the analogy is persuasive when the Attorney General actually promulgates Guidelines for supervision by the United States Attorney in specific circumstances, *see United States* v. *Leahey, supra; United States* v. *Heffner*, 420 F. 2d 809 (4th Cir. 1969) (*non-constitutional*

[5] Office of the Attorney General, Order No. 431–70, Establishing Guidelines Governing Interrelationships Between Strike Forces and United States Attorneys' Offices, reprinted in *In re Subpoena of Persico*, 522 F. 2d 41, 68 (2d Cir. 1975) (appendix) (hereinafter "Guidelines").

ground), and inconsistent treatment results therefrom.

We exercised supervisory power in the limited area of the relationship between the Strike Force attorney and the United States Attorney under a fair inference from the Guidelines, though not as a generally applicable exclusionary rule. Although we have confirmed the right of Strike Force attorneys to appear before the grand jury, *see Persico, supra,* we are not committed by statute to allowing them to come into the circuit and to evade the rules and supervision of the United States Attorneys. We think it our duty to avoid uneven justice in the circuit, resulting from mere negligence or inattention to established practice and guidelines. There is, of course, nothing to prevent the Department of Justice from formulating a national policy to *prohibit* all prosecutors from following the ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function (Approved Draft 1971) Section 3.6(d) which provides:

> If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.

It is an important function of the administration of criminal justice to let our citizens know that equal justice is available to all, as the Chief Justice has so eloquently said on more than one occasion. Having determined that the policy of the various prosecutors should be uniform—constitutional limitations quite aside—we were confronted with the proper remedy to apply. Normally, any appellate court finds itself in a veritable dilemma when its choice is between vindicating a rule by sanction and allowing a possibly guilty

person to escape. In this case, fortunately, we faced no such dilemma. For the appellant remains indicted for the substantive crime, and, if certiorari had not been applied for, would already have been tried by a jury. *See United States* v. *Mandujano, supra,* 96 S. Ct. at 1773 n.2, where the prosecutor obtained a conviction on the substantive count before the Supreme Court heard the appeal on the perjury count.

We abhor perjury, but the limited question is whether, in these particular circumstances, the prosecution was entitled to the luxury of a perjury count, which in this case was essentially a strategic ploy which would make conviction of the substantive count easier if the counts were to be joined in a single trial.[*] In this case, the Government claims to have a recorded transcript which purportedly establishes guilt on the substantive count. To quote Judge Stevens (now Mr. Justice Stevens) in a similar connection:

> Accepting the prosecutors' evidence as true, defendant's participation in the crime had already been established and, therefore, no further investigation was necessary. * * * If the evidence of guilt is as strong as the prosecutor contends, such direct communication [with the defendant in the absence of counsel] is all the more offensive because it was unnecessary. If there is doubt about defendant's guilt, it should not be overcome by a procedure such as this. *United States* v. *Springer,* 460 F. 2d 1344, 1354 (7th Cir. 1972) (dissenting opinion).

Finally, we should state in response to the request for clarification in Mr. Justice Stevens' concurring

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[*] The maximum penalty for violation of 18 U.S.C. § 1623 is imprisonment for five years and a $10,000 fine. It is hardly likely that upon conviction of a first offender, this maximum would be inadequate.

opinion that we did not assume that an error of the prosecutor in failing to give warning in the grand jury would lead inexorably to the conclusion that the witness cannot be prosecuted for perjury. On the contrary, we had assumed the opposite,—that she could be so prosecuted [1] as the Supreme Court later held in *Mandujano*.

For the reasons previously stated, our opinion was based only on our supervisory power, exercised in a circumscribed manner involving the Strike Force, and in circumstances where under the sanction imposed, a guilty person, in any event, would not be likely to escape conviction because of our ruling.

We intended our opinion to have no prospective application as precedent for the District Courts on the constitutional issue. Our only purpose was to make the practice of the Task Force conform to that of the United States Attorney in the *same* district, and we think that the sanction of suppression is salutary in the circumstances.

II

After the remand we ordered a second oral argument. The Government presses two points: (1) that we do not have power to suppress the testimony, and (2) that *Mandujano* compels reversal of Judge Neaher's order suppressing the testimony and dismissing Count Two.

At oral argument, the Government conceded, perhaps reluctantly, that the Courts of Appeals do have supervisory power. Mr. Justice Rehnquist stated the

[1] *Cf. United States* v. *Winter*, *supra*, 348 F. 2d at 208.

general rule, in *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973):

> Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandate, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or the Constitution.[8]

The supervisory power in criminal cases was stated to exist in the oft-cited case of *McNabb* v. *United States*, 318 U.S. 332, 340 (1943), with respect to the Supreme Court. The Courts of Appeals have repeatedly exercised this power in criminal actions. In *Burton* v. *United States*, 483 F. 2d 1182 (9th Cir. 1973), the court quoted the Supreme Court's statement in *LaBuy*, *supra*, that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system", 352 U.S. at 259–60, and noted that "this pronouncement has been reaffirmed by every Court of Appeals". 483 F. 2d at 1187.[9] And in this Circuit the power has been clearly recognized. *See United States* v. *Toscanino*, 500 F. 2d 267, 276 (2d Cir. 1974); *United States* v. *Estepa*, 471 F. 2d 1132, 1136 (2d Cir. 1972); *United States* v. *D'Angiolillo*,

[8] While *Cupp* involved a state court appeal, the quoted discussion concerned the federal Courts of Appeals. In any case, it is clear that there is federal supervisory power of the Court of Appeals over the District Courts. *See La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259–60 (1957).

[9] Of the 30 cases cited in *Burton* for this proposition, 25 involved criminal actions or grand jury proceedings.

340 F. 2d 453, 456 (2d Cir.), *cert. denied,* 380 U.S. 955 (1965); *United States* v. *Dooling,* 406 F. 2d 192, 198 (2d Cir. 1969)."

A specific example that comes to mind relates to the *Allen* charge. In *Allen v. United States,* 164 U.S. 492, 501-02 (1896), the Supreme Court approved a lower court charge which still bears the name of that case. Despite this *imprimatur,* some federal courts of appeals, in avowed exercise of their supervisory power, have directed trial judges not to use it. *United States* v. *Thomas,* 449 F. 2d 1177, 1186 (D.C. Cir. 1971); *United States* v. *Fioravanti,* 412 F. 2d 407, 420 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969); *United States* v. *Brown,* 411 F. 2d 930, 933 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017 (1970). These cases surely do not demonstrate a disrespect for the Supreme Court. They perhaps, in part, represent a recognition of the undesirability of unequal treatment, as evidenced by many appeals, when some judges use the *Allen* charge and others do not.

Despite this cogent history of the supervisory powers of the federal courts of appeals, the Government contends that two Acts of Congress stand in the way of the exercise of such supervisory power. First, it points to 18 U.S.C. § 3501(a) which provides that a confession, which includes "any self-incriminating statement" 3501(e), "shall be admissible in evidence if it is voluntarily given," and draws the conclusion

[10] In *United States* v. *Freeman,* 357 F. 2d 606, 614 (2d Cir. 1966), Judge Kaufman (now Chief Judge) noted that "our duty to supervise the administration of criminal justice in the courts of this Circuit can hardly be subject to the same restrictions as our power to impose constitutional requirements upon unwilling state tribunals".

that the Court of Appeals therefore had no power to suppress it. On its face, Section 3501 deals with the admissibility of confessions at *trial.* At such trial, the trial judge is not compelled to admit the "confession" unless he finds it voluntary, but "in determining the issue of voluntariness he shall take into consideration all the circumstances surrounding the giving of the confession." § 3501(b). Among the enumerated factors to be considered is "whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession." There is no evidence that Mrs. Jacobs had such knowledge. Nor do we see by what semantic process a denial of guilt can be called a confession. A denial is not an admission, and by the same token, it is not a "confession" or "self-incriminating statement."

Second, the Government takes the extreme position that by Rule 402 of the Federal Rules of Evidence (a Congressional enactment) relevant evidence is to be excluded solely in those cases where exclusion is required "by the Constitution of the United States by Act of Congress, by those rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." It offers no history to support the view that Congress was concerning itself with the supervisory powers of the federal courts. The obvious purpose of the catchall clause was to bar common law rules of evidence or state rules of evidence, if inconsistent.

In deciding the issue we need not agree or disagree with the dictum concerning § 3501(a) in *United States* v. *Crook,* 502 F. 2d 1378 (3d Cir. 1974), *cert. denied,* 419 U.S. 1123 (1975). In that case there was a claim

of violation of *Massiah* rights [11] by the FBI in questioning Crook. The Court of Appeals held that appellant had knowingly waived his right to consult counsel and that "there was full compliance with *Miranda*." Therefore, the reference to Section 3501(a) was unnecessary to the decision. In *Crook* failure to give notice *precluded* a knowing waiver. Finally, in *Crook*, there was a real "confession" not a denial of guilt." [12]

It requires a good deal of stretching to say that these general statutes, in any event, were preclusive of supervisory power which is exercised, not in derogation of a procedural rule or statute, but for the limited purpose of preventing chaos in criminal law administration through the presence in the same district of a two-headed prosecution branch operating on conflicting procedures. We assert no roving commission to right the wrongs of criminal defendants.

It is in the exercise of that extremely restricted assertion of supervisory power that we approach our duty under *Mandujano*. We have recognized that a constitutional claim may not be asserted as a defense to a perjury charge. *United States* v. *Winter, supra,* note 7. And implicit in our previous opinion was the recognition of *United States* v. *Knox*, 396 U.S. 77 (1969), and related cases. We also clearly noted that a potential defendant had no constitutional right not to be called before the grand jury, citing *Winter, supra,*

[11] *See Massiah* v. *United States*, 377 U.S. 201 (1964).

[12] "Crook is before the District Court on an indictment charging robbery of a Wyncote, Pennsylvania bank, and the challenged statement *admitted* that he did so." 502 F. 2d at 1379 (emphasis added). *See also United States* v. *DiGilio*, 538 F. 2d 972 (3d Cir. 1976). This case relied upon *Crook* and involved no question of whether defendants are treated differently by the Strike Force than the normal practice would require.

and *United States* v. *Dionisio*, 410 U.S. 1, 10, n. 8 (1973). We did not think it useful to explore the constitutional situation in detail, for we relied on no constitutional doctrine in imposing the sanction.

III

What we must now reconsider is whether the sanction we imposed was too harsh for the didactic purpose intended in light of *Mandujano*. Here we find some difficulty in assessing the meaning of the remand.

We do not know whether the Supreme Court meant that we should, under no circumstances, use our supervisory power because this is a perjury case, or whether we should reconsider the sanction of suppression in the light of the constitutional holding of *Mandujano*. We are inclined to believe it is the latter, for the Supreme Court had no occasion in *Mandujano* to consider the effect of a generation of uniform practice by the United States Attorneys in the Second Circuit, now broken apparently by a lack of liaison in the prosecuting function of Government. Moreover, the Fifth Circuit in *Mandujano* had relied on an extension of *Miranda* warnings to grand jury witnesses, which was not our point at all.

We placed no emphasis on the circumstance that this testimony involved a perjury count as well as a count for an alleged violation of 18 U.S.C. § 875(c). We simply affirmed the suppression of appellant's testimony which could presumably be used in the prosecution of the substantive count as well. In sum, we did not agree to the District Court's suppression *because* it was allegedly perjured testimony, nor did we strike the perjury indictment as such.

In imposing the sanction of suppression, and, in these special circumstances, the concomitant dismissal of the perjury count for lack of a predicate, we did not go as far as we did in *United States* v. *Estepa, supra.* There we reversed a narcotics conviction and dismissed the indictment after a trial establishing guilt, not because of any constitutional mandate, *see United States* v. *Costello,* 350 U.S. 359 (1956), but in the exercise of our supervisory power. There Judge Friendly (then Chief Judge) said "* * * a reversal with instructions to dismiss the indictment may help to translate the assurance of the United States Attorneys into *consistent* performance by their assistants." 471 F. 2d at 1137 (emphasis added). We have commented *in camera* from time to time on the failure of certain special attorneys to avail themselves of the central repository of legal knowledge and judgment that exists in the regular United States Attorneys' offices.

Since we did not anticipate an affirmance of the Fifth Circuit in *Mandujano* and did not rely on the decision of that Court which was subsequently reversed, we respectfully adhere to our previous decision. We note that it is not intended to mandate any specific procedure, but to serve as an *ad hoc* sanction, as in *Estepa,* to enforce "consistent performance" one way or the other. Appellant [sic] will, in any event, be tried on a serious substantive count. But the effect of the sanction may be to bring the Strike Force and the United States Attorney to closer harmony, a boon for even-handed law enforcement which often will redound to the benefit of the prosecution rather than of the defense.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 443—September Term, 1975

(Argued November 13, 1975, Decided February 24, 1976) Docket No. 75-1319

UNITED STATES OF AMERICA, APPELLANT

against

ESTELLE JACOBS, A/K/A "MRS. KRAMER," DEFENDANT-APPELLEE

Before: FEINBERG, GURFEIN AND VAN GRAAFEILAND, Circuit Judges

Appeal from an order of the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge,* which granted defendant-appellee's motion to suppress her Grand Jury testimony and to dismiss Count Two of the indictment against her.

Affirmed.

Edward C. Weiner, Special Attorney, United States Department of Justice (David G. Trager, United States Attorney, Eastern District of New York), for *Appellant.*

Irving P. Seidman, New York, N.Y. (Rubin, Seidman & Dochter, New York, N.Y., of counsel), *for Defendant-Appellee.*

GURFEIN, *Circuit Judge:* The United States appeals from an order of the United States District

Court for the Eastern District of New York (Hon. Edward R. Neaher, *Judge*), granting a motion to suppress the Grand Jury testimony of defendant-appellee Estelle Jacobs and dismissing Count Two of the indictment against her.[1] The defendant had moved for an evidentiary hearing and an order to dismiss the indictment on the ground, *inter alia*, that she was a subject of the investigation but had not been informed that she was a subject when she was subpoenaed to testify before the Grand Jury. Judge Neaher granted the motion to dismiss Count Two of the indictment which charged the making of false statements before the Grand Jury in violation of 18 U.S.C. § 1623, but denied the motion to dismiss Count One. The government appeals the dismissal of Count Two pursuant to 18 U.S.C. § 3731.

The facts are not in dispute with regard to the procedure followed. The defendant is a housewife who was employed at various times in a collection agency. During March 1973 Harry W. Stonesifer, Jr. ("Harry"), using the name of his brother, William D. Stonesifer ("William"), incurred a gambling debt of $5,060 on a junket to Puerto Rico. During May 1973 defendant serviced this collection account for her employer. She made several telephone calls in that connection, and on May 22, 1973 she allegedly made a telephone call to William, recorded on tape by him, which contained a threat to injure the person of Harry. William notified the Federal Bureau of Investigation ("FBI"). On September 13, 1973

[1] The indictment, filed on November 11, 1974, contains two counts: Count One charged a violation of 18 U.S.C. § 875(e)—transmitting in interstate commerce a threat to kidnap or injure another. Count Two was the perjury count which was dismissed and which is the subject of this appeal.

the defendant was interviewed by the FBI who advised her of her *Miranda* rights including the right to remain silent and the right to appointed counsel. She signed an "Advice of Rights" form. The agents questioned her about the Stonesifer account and the fact that she had used the name "Mrs. Kramer" in making telephone calls on the Stonesifer account. She denied that she had harassed William on the telephone. She was not told that her conversation had been recorded.

On June 10, 1974, about nine months later, she was called before the Grand Jury by a subpoena issued by the Organized Crime Strike Force.[2] She appeared without counsel at that first session; she was warned by the Strike Force Attorney that under the Fifth Amendment she could "refuse to answer any question that you feel might tend to incriminate you." She was also told that under the Sixth Amendment she had a right to counsel of her choice who could be outside the Grand Jury room to assist her "about the procedures on any specific questions." Asked whether she felt the need of an attorney, she responded, "I do not." She was also informed that perjury is a "very serious offense." Appellee was asked to affirm or deny her conversations with William which had been recorded, though the fact of recording was not disclosed to her. Her denials were the basis for Count Two of the indictment.

[2] The Strike Force attorneys operate under a commission from the Attorney General pursuant to 28 U.S.C. § 515(a) and under guidelines promulgated by the Attorney General. See Office of the Attorney General, Order No. 431-70, Establishing Guidelines Governing Interrelationships Between Strike Forces and United States Attorneys' Offices, reprinted in *In re Persico*, 522 F. 2d 41, 68 (2 Cir. 1975) (appendix).

The Strike Force attorney at her first appearance before the Grand Jury had in his possession the recording of her conversation with William, and, as Judge Neaher found, "[t]he government admits that when she was called to testify before the grand jury the defendant was not just another witness, but was in fact a 'putative defendant,' in that the government had incriminating evidence against her." Nevertheless, she was not warned at the time of her first appearance that she was a subject of the investigation or that she had an absolute right to remain silent.

The District Court concluded that, under the circumstances, the defendant was entitled to "full" *Miranda* warnings including the advice that she had an absolute right to remain silent. It noted that "simply with the possession of the wiretap tape, the government undoubtedly felt it had all but the identity evidence for probable cause to be found by the grand jury that Jacobs violated 18 U.S.C. § 875(c)." He also noted that the Grand Jury had been presented with "sufficient independent identity evidence." The court ruled, accordingly, that "[u]nder the circumstances, asking her if she made the statements the government already had recorded, without fair warning of the trap she was being led into is not permissible prosecutorial conduct," since "the questions which led to the alleged perjurious responses served *no other function* than to give the government an additional prop on which to base its case against defendant" (emphasis in original).

Judge Neaher relied on *United States* v. *Mandujano*, 496 F. 2d 1050 (5 Cir. 1974), *cert. granted*, 420 U.S. 989 (1975). He concluded, as had the Fifth

Circuit, that the prosecutorial conduct involved was "so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process." 496 F. 2d at 1059.[3] His decision to dismiss the false statement count was predicated on the "due process" clause of the Fifth Amendment rather than on its "self-incrimination" provision.

We do not reach either the claimed "self-incrimination" violation or the claimed "due process" violation under the Fifth Amendment. We have held that a prospective defendant may be questioned before a Grand Jury about statements he made in a recording in the possession of the government, without being told of the existence of the recording. *United States* v. *Del Toro*, 513 F. 2d 656, 664 (2 Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (U.S. Oct. 6, 1975). But we noted that the defendants had been advised not only of their constitutional rights but also that each "was a target of the investigation." 513 F. 2d at 660.[4] That was not done here.

It appeared to us that prosecutors in this circuit generally had been following Section 3.6(d) of the ABA Project on Standards for Criminal Justice,

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[3] In *Mandujano*, as here, a Special Attorney was involved. As the court noted, "[s]omewhere within this chain of command and information" between him and the United States Attorney a decision was made to subpoena Mandujano as a witness. 496 F. 2d at 1058 n.8.

[4] So, too, in *United States* v. *Winter*, 348 F. 2d 204, 205 (2 Cir.), *cert. denied*, 382 U.S. 955 (1965), also a perjury prosecution, the defendant was advised that he was "a prospective defendant," and we left aside the question whether a potential defendant must be advised of his status since that question was not presented on the facts of the case. 348 F. 2d at 208.

Standards Relating to the Prosecution Function (Approved Draft 1971).[5] Section 3.6(d) provides:

> If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.

See *United States* v. *Washington*, 328 A. 2d 98, 100 (D.C. App. 1974).

We did not wish simply to assume, however, that all prosecutors in the circuit now adhere to this standard. We accordingly directed the clerk of our court to make written inquiry of the United States Attorneys for each district in the circuit concerning their practice in this regard.

The United States Attorneys have replied with unanimity that where a person called before the Grand Jury is known to be a potential defendant he is warned that he is a "target of the investigation" or a "subject of the investigation." More particularly, the United States Attorney for the Eastern District of New York, where the Grand Jury which heard this defendant sat, replied that "our practice is to advise the potential defendant * * * that he is a target of the investigation."

We thus have a situation in the Eastern District where if Estelle Jacobs had appeared before the Grand Jury on a subpoena issued by the United

[5] See, *e.g.*, *United States* v. *Bonacorsa*, slip op. 1451, 1460 (2 Cir. Jan. 9, 1976); *United States* v. *Del Toro*, *supra*, 513 F. 2d at 660; *United States* v. *Corallo*, 413 F. 2d 1306, 1328, 1329 n.6 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969); *United States* v. *Irwin*, 354 F. 2d 192, 199 (2 Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *United States* v. *Winter*, *supra*, 348 F. 2d at 205; cf. *United States* v. *Scully*, 225 F. 2d 113, 116 (2 Cir.), *cert. denied*, 350 U.S. 897 (1955).

States Attorney she would have been warned that she was a target, while the Strike Force operating in the same district failed to give her such warning.

In this posture of conflicting conceptions of prosecutorial fairness in the same district, we need not consider whether there is a constitutional due process claim as the court below held. Uniform justice is not achieved in the face of such disparity which, if not in actual violation of the Constitution, is, at least, outside the penumbra of fair play. In *In re Persico*, 522 F. 2d 41 (2 Cir. 1975), we upheld the right of Strike Force attorneys to appear before the Grand Jury partly because they were under the supervision of the United States Attorneys. We are sorry to learn that this may not always be the fact. We suggest that Strike Force attorneys should be instructed on and should adhere to the practices of the United States Attorney.[6]

[6] Reviewing the guidelines set out in Appendix A to the *Persico* opinion, *supra*, we note that there appears to be an omission with regard to the matter here at issue. It is provided, *inter alia*, that "[t]he Chief of the Strike Force and the United States Attorney * * * shall have the responsibility of keeping each other fully advised of all organized criminal matters in progress." 522 F. 2d at 68. "Fully" is perhaps too ambiguous and requires clarification. It is also provided: "When a specific investigation has progressed to the point where there is to be a presentation for an indictment, the Chief of the Strike Force shall then for this purpose operate under the direction of the United States Attorney who shall oversee the judicial phase of the development of the case."

Id. at 69. What is lacking is a statement that when the investigation has progressed to the point where witnesses are called to testify before the Grand Jury, the Strike Force shall operate under the direction of the United States Attorney. We think this should have been assumed by the Strike Force since, under the guidelines, even preliminaries, such as arrest warrants and search warrants are, where practicable, to be sought with the concurrence of the United States Attorney. *Id.*

In the interest of uniformity in criminal procedure within the circuit, which is a fundamental of the administration of criminal justice, we affirm the dismissal of Count Two pursuant to our supervisory function.

We do not mean to imply that a potential defendant has a constitutional right not to be called before the Grand Jury at all. See *United States* v. *Dionisio*, 410 U.S. 1, 10 n.8 (1973); *United States* v. *Doe*, 457 F. 2d 895, 898 (2 Cir. 1972), *cert. denied*, 410 U.S. 941 (1973); *United States* v. *Winter*, 348 F. 2d 204, 207–08 (2 Cir.), *cert. denied*, 382 U.S. 955 (1965). Nor do we deal with perjury committed by a prospective defendant after adequate warning of his status. We are satisfied that we should affirm in this case solely under our supervisory power.[1]

[1] Since the suppression of the Grand Jury testimony wipes out the entire predicate for the perjury count in this case, Judge Neaher also properly dismissed Count Two of the indictment before trial.

APPENDIX C

United States Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of February one thousand nine hundred and seventy-six.

Present: Hon. Wilfred Feinberg, Hon. Murray I. Gurfein, Hon. Ellsworth Van Graafeiland, *Circuit Judges.*

[Filed Feb. 24, 1976, A. Daniel Fusaro, Clerk]

75–1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ESTELLE JACOBS, a/k/a "MRS. KRAMER",
DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

By /s/ Vincent A. Carlin,
VINCENT A. CARLIN,
Chief Deputy Clerk.

APPENDIX D

United States Court of Appeals, Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy-six.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER",
DEFENDANT-APPELLEE

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, United States of America, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ Irving R. Kaufman,
IRVING R. KAUFMAN,
Chief Judge.

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the

United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy-six.

Present: Hon. Wilfred Feinberg, Hon. Murray I. Gurfein, Hon. Ellsworth Van Graafeiland, *Circuit Judges.*

75-1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER",
DEFENDANT-APPELLEE

A petition for a rehearing having been filed herein by counsel for the appellant, United States of America

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX E

United States District Court, Eastern District of New York

74 CR 703

UNITED STATES OF AMERICA

against

ESTELLE JACOBS, A/K/A "MRS. KRAMER", DEFENDANT

Appearances: David G. Trager, Esq., United States Attorney, Eastern District of New York, by Edward C. Weiner, Esq., Special Attorney, United States Department of Justice. Rubin, Seidman & Dochter, Esqs., Attorneys for Defendant, by Irving P. Seidman, Esq.

MEMORANDUM AND ORDER

NEAHER, *District Judge:* The defendant moves to dismiss the indictment on the ground, *inter alia,* that when called before the grand jury to testify, she was not warned that she was a subject of the investigation.

The facts are not in dispute. The defendant is a housewife who was employed at various times in a credit collection agency. She appeared when summoned, without counsel, before a federal grand jury on June 10, 1974 and on November 4, 1974. The government admits that when she was called to testify before the grand jury the defendant was not just another witness, but was in fact a "putative

defendant," in that the government had incriminating evidence against her.[1]

The warnings given her on each occasion are set forth in the margin.[2] She was not warned at the time of her first appearance that she was the subject of the investigation. Shortly after her second appearance she was indicted for communicating a threat over the telephone, 18 U.S.C. § 875(c), and for perjury before the grand jury, 18 U.S.C. § 1623, when she denied the alleged threatening statements.

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[1] The grand jury transcript of November 4, 1974 (at p. 4) makes it clear that the defendant was a "subject" of the grand jury investigation, and government counsel who conducted the grand jury investigation, Edward C. Weiner, Esq., admitted this in open court and in his brief (at p. 15). Moreover, an internal Department of Justice memorandum, February 15, 1974, disclosed to the court in connection with defendant's argument that Mr. Weiner lacked proper authorization to appear before the grand jury, reveals that the defendant was indeed a target of the grand jury investigation.

[2] June 10, 1974:

"Q. Mrs. Kramer, I want to explain to you your various Constitutional rights that you have as a witness who appears before a Federal Grand Jury. I want to tell you that this is a Federal Grand Jury inquiring into the possibility of a violation of the Federal Criminal Law, and the first right you have is the right under the Fifth Amendment to refuse to answer any question that you feel might tend to incriminate you; do you understand what your rights are under the Fifth Amendment?

"A. Yes.

"Q. At any time you feel the questions I am asking may tend to incriminate you, you will not be obliged to answer those questions; do you understand that?

"A. Yes, I do.

* * * * *

"Q. Now, the next right you have under the Sixth Amendment, is the right to counsel; you can have a lawyer of your choice outside of the Grand Jury room to assist you with any questions that

Jacobs was therefore in much the same situation as the "putative defendants" in *United States* v. *Mandujano*, 496 F. 2d 1050 (5 Cir. 1974), *cert. granted*, 95 S. Ct. 1422 (1975), and in *United States* v. *Rangel*, 496 F. 2d 1059 (5 Cir. 1974). In those cases, the court,

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you may have a question with * * * you may have an opportunity to leave the Grand Jury room and consult with your attorney, do you understand that right?

"A. Yes, I do.

"Q. Do you have an attorney with you today?

"A. No, I do not.

"Q. Now, do you feel the need of one?

"A. I do not."

Transcript at 2–3.

November 4, 1974:

"Q. I believe you appeared before this Grand Jury on June 10, 1974, is that correct?

"A. That's correct.

"Q. At that time, Mrs. Jacobs, I explained to you your various Constitutional rights.

Do you have any questions now about those rights?

"A. No.

[Government counsel then repeated substantially the Fifth Amendment privilege and right to counsel warnings as above set forth.]

"Q. If at any time you would like to interrupt the proceedings and call an attorney, let me know and you will be given the opportunity.

"A. There is one question as to Mr. Weiner—

"Q. Yes.

"A. I'm here and you are asking me if I feel—I don't know why I'm here, Mr. Weiner, to be very honest with you. You are implying do I feel, do I need an attorney. I have asked you repeatedly why am I here.

"Q. You are a subject of this investigation, Mrs. Jacobs.

"A. I told you everything I know, Mr. Weiner.

"Q. I have some additional questions and that's why you're here today."

Transcript at 2–4.

underscoring that the questioning proceeded without full *Miranda* warnings regarding the defendants' rights to remain silent and to appointed counsel, found the questioning concerning criminal activity under the circumstances to be "beyond the *pale of permissible prosecutorial conduct*," *United States* v. *Mandujano*, *supra*, 495 F. 2d at 1058 (emphasis in original), and a violation of Fifth Amendment Due Process. *Id.* The court reasoned that grand jury questioning by the prosecutor in such circumstances smacks of entrapment and the baiting of the defendant to commit perjury. Since the defendant in each case was not likely to confess to a crime before the grand jury, "[h]is only 'safe harbor' was to remain silent—a right of which the government failed to inform him." *Id.* at 1055. While a defendant could have asserted his Fifth Amendment privilege against self-incrimination in such circumstances, the court found the warnings advising of such a right to be minimally adequate at best in a situation where questions were asked calculated to elicit answers that were either incriminatory or perjurious. Under such circumstances, the court held that a full Fifth Amendment warning which includes the right to remain silent must be given. *Id.* at 1056–57.

In this case Jacobs, brought before the grand jury the first time without being told she was a subject of the investigation[3] or that she had the absolute right to remain silent, was asked specific questions concerning the making of allegedly threatening statements. In framing the questions which are alleged to have resulted in perjury, the prosecutor appar-

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[3] She was only told this at her second appearance, see n.2, *supra*, while the basis of the perjury count was her testimony at her first appearance.

ently read from a transcript of the telephone conversation during which the threats were allegedly made. It is now clear that this was possible only because the government had beforehand a tape recording of the conversation allegedly involving the defendant, derived from a phone wiretap. In short, before the defendant made her first appearance before the grand jury, the government prosecutor had undoubtedly made his own factual determination, to his satisfaction, that Jacobs was guilty of the crime about which she was questioned and later indicted. And, simply with the possession of the wiretap tape, the government undoubtedly felt it had all but the identity evidence for probable cause to be found by the grand jury that Jacobs violated 18 U.S.C. § 875(c).[4]

Under the circumstances, asking her if she made the statements the government already had recorded, without fair warning of the trap she was being led into is not permissible prosecutorial conduct.[5] Had the questions served some useful investigatory function, the conclusion might be otherwise. But no suggestion has been made to the court that such a purpose lay behind the question, and the court must agree with defense counsel's assessment that the questions which led to

[4] Further, the government's own brief (at 12) admits that the grand jury was presented with sufficient independent identity evidence.

[5] See *United States* v. *Washington*, 328 A. 2d 98, 100 (D.C.C.A. 1974), which found the failure to advise the defendant that he was a potential defendant contravened Standard 3.6(d) of the ABA Project on Standards for Criminal Justice, The Prosecution Function. That section provides: "If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights."

the alleged perjurous responses served *no other function* than to give the government an additional prop on which to base its case against defendant.

The court therefore sees no reason why the result reached in *Mandujano* should not control here. The *Mandujano* court simply concluded that the prosecutorial conduct involved was "so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process." 496 F. 2d at 1059. We have reviewed the authorities cited by the government which are said to suggest a contrary result. None of the cases cited suggests either that no grand jury questioning of a putative defendant can ever amount to a deprivation of due process[6] or that due process should not be tested in such cases by an appraisal of *all* the relevant facts and circumstances.

On such an appraisal, the court concludes that the entire grand jury proceeding was a violation of Jacobs' due process rights under the Fifth Amendment. Consequently, all her grand jury testimony

[6] See, *e.g.*, *United States* v. *Corrallo*, 413 F. 2d 1306 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969), in which warnings that the defendants were subjects of the investigation were given. *Id.* at 1328 & 1329 n.6. In *United States* v. *Winter*, 348 F. 2d 204 (2 Cir.) *cert. denied*, 382 U.S. 955 (1965), the court found a much clearer legitimate interest in the defendant's being summoned before the grand jury. *Id.* at 208. In *United States* v. *Scully*, 225 F. 2d 113 (2 Cir.), *cert. denied*, 350 U.S. 897 (1955), it was far from clear that Scully was "marked for prosecution." *Id.* at 114.

The government's other cited authorities are either similarly inapposite or support the conclusion reached here. *E.g.*, *United States* v. *Luxenberg*, 374 F. 2d 241, 246 (6 Cir. 1967), citing *Stanley* v. *United States*, 245 F. 2d 427, 434 (6 Cir. 1957), both cited by the government, states that "a person who is virtually in the position of a defendant must be accorded the same rights as a defendant."

must be suppressed and the perjury count, being based solely upon such testimony, must be dismissed.

The defendant's various motions to dismiss are otherwise denied in accordance with the views expressed by the court at oral argument. Discussion of any other outstanding matters is reserved for September 18, 1975, at 10:00 a.m., at which time a prompt date for trial of the indictment will be set.

So ordered.

/s/ EDWARD A. NEAHER,
U.S.D.J.

Dated: Brooklyn, New York, July 21, 1975.

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U.S. GOVERNMENT PRINTING OFFICE: 1977

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1193

UNITED STATES OF AMERICA, PETITIONER

v.

ESTELLE JACOBS, a/k/a "MRS. KRAMER"

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 28, 1977
CERTIORARI GRANTED MAY 31, 1977

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1193

UNITED STATES OF AMERICA, PETITIONER

v.

ESTELLE JACOBS, a/k/a "MRS. KRAMER"

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

DATE	PROCEEDINGS
11/11/74	Before WEINSTEIN, J.—Indictment filed.
11/22/74	Before NEAHER, J.—Case called—Pleading adjd to 12/3/74 at 10:00.
12/ 3/74	Before NEAHER, J.—case called—deft present with counsel—Deft arraigned and enters a plea of not guilty—case set down for status report for Jan. 28, 1975 at 10:00 am—bail fixed at $10,000 P/R bond.
12/27/74	Magistrate's file 74 M 1681 inserted into CR file.
1/28/75	Notice of Readiness for Trial filed.
1/28/75	Before NEAHER, J.—case called—deft & atty Patrick Wall present—case set for trial for June 23, 1975 at 10:00 am—all motions to be filed not later than March 14, 1975.
4/28/75	Govt's memorandum in response to various pre-trial motions filed
5/15/75	Notice of Motion filed for evidentiary hearing dismissal of all counts, etc. received from Chambers with letter dated 4-25-75 from Edward Weiner, Special Atty. Strike Force
6/ 6/75	Before NEAHER, J.—case called—deft & counsel I. P. Seidman present—defts motion argued and decision reserved.
6/20/75	Before NEAHER, J.—case called—deft Jacobs not present—counsel I. Seidman present—adjd to Dec. 1, 1975 for trial.
7/21/75	By NEAHER, J.—Memorandum and Order filed on defts motion for dismissal—The court concludes that the entire Grand Jury proceeding was a violation of Jacobs due process rights under the Fifth Amendment. Consequently, all her grand jury testimony must be suppressed and the perjury count, being based solely upon such testimony, must be dismissed. Defts various motions to dismiss are otherwise denied in accordance with the views expressed by the court at oral argument. Discussion of any other outstanding matters is reserved for Sept. 18, 1975 at 10:00 am at which time a prompt date for trial will be set.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
..... X
UNITED STATES OF AMERICA
—against—
ESTELLE JACOBS, a/k/a MRS. KRAMER, FRANK PROVEZANO, a/k/a JAMES HUNTER CHECK ADJUSTMENT BUREAU
..... X

Criminal Folder
#

225 Cadman Plaza East
Brooklyn, New York

June 10, 1974

GRAND JURY MINUTES

Presented by:
EDWARD P. WEINER, ESQ.,
Assistant United States Attorney

Reported by:
Howard A. Goodman

Witness:
ESTELLE JACOBS

ESTELLE JACOBS, having first been duly sworn, assumed her seat as a witness and testified as follows:

EXAMINATION BY
MR. WEINER:

Q. What is your name?
A. Estelle Jacobs.
Q. Where do you reside?
A. 51 Keller Street, Valley Stream, Long Island.
Q. Have you been known by any other name other than Mrs. Jacobs?
A. No.
Q. You were never known by any other name?
A. Yes, in business, I have been known as——.

Q. What are these other names?
A. In business, I have used other names. I have used several names. It's difficult to remember over the years.
Q. Well, try and list them for us?
A. I used Mrs. Kay. I also used Mrs. Kramer quite a bit in my last job. The spelling of that is K-R-A-M-E-R. I don't recall at the present anything else that I may have used.
Q. What is your maiden name?
A. Pearlman.
Q. And now, you presently reside at 51 Keller Street?
A. That's right.
Q. And now, what is your present occupation?
A. Well, I guess, I would check for skip tracing.
Q. Mrs. Kramer, I want to explain to you your various Constitutional rights that you have as a witness who appears before a Federal Grand Jury. I want to tell you that this is a Federal Grand Jury inquiring into the possibility of a violation of the Federal Criminal Law, and the first right you have is the right under the Fifth Amendment to refuse to answer any question that you feel might tend to incriminate you; do you understand what your rights are under the Fifth Amendment?
A. Yes.
Q. At any time you feel the questions I am asking may tend to incriminate you, you will not be obliged to answer those questions; do you understand that?
A. Yes, I do.
Q. And now, do you understand that the Fifth Amendment privileges against self-incrimination, that that privilege is extended to you and not to any information or to any other individual that might be incriminated; do you understand that right?
A. Yes, I do.
Q. Now, the next right you have under the Sixth Amendment, is the right to counsel; you can have a lawyer of your choice outside of the Grand Jury room to assist you with any questions that you may have a question with. You may have a question about the procedures or any specific questions, that you may have an opportunity to leave the Grand Jury room and consult with your attorney; do you understand that right?
A. Yes, I do.

Q. Do you have an attorney with you today?
A. No, I do not.
Q. Now, do you feel the need of one?
A. I do not.
Q. And now, at any time you feel like stepping outside the Grand Jury room to call an attorney or consult with an attorney, you let us know and we'll give you that opportunity.
A. Fine.
Q. Now, I want you to understand that there are Federal Laws against perjury. Perjury is a very serious offense; do you understand that?
A. Yes.
Q. Do you understand what perjury is?
A. Yes, I do.
Q. And now, in your present occupation as a skip tracer, or collector, are you presently employed by any individual or corporation?
A. No, I gave my notice in last week.
Q. By whom were you employed at that time?
A. I was employed for Walter Cox at Prompt Reports.
Q. How long have you been working for Mr. Cox at Prompt Reports?
A. Off and on, I would say about 6 months. Part-time.
Q. Part-time?
A. Yes.
Q. What was your salary?
A. Well, I was employed as a weekend worker. It's hard to say. The salary varied. I was an independent worker. There were times that Mr. Cox would give me $200.00 and there were times he wouldn't give me anything. It would vary as to how often I would come in.
Q. Did you work on commission?
A. An independent worker does work on commission basis. It depended on who you located and how much you collected and so forth.
Q. Can you give me an idea or any approximation of the basis of per cent of commission that you would get on a collection?
A. I wasn't on a percentage basis. Maybe I explained that incorrectly. I was employed independently and he varied my salary roughly for about a year or two. He gave me $200.00 each week.

There were times when I only worked an hour a day and there were days I didn't work. It's hard to say how much I collected. How much came into the office.
Q. Now, prior to your job with Mr. Cox, where did you work?
A. I worked—I recall the name. I worked for Frank Provezano.
I'm a little nervous now. It's hard to recall exactly the name of the company he used.
Q. Now, was it Check Adjustment Bureau?
A. That's right. It went under another name—Mel—I don't recall it at the present.
Q. How long did you work for Mr. Provezano?
A. Roughly for about 10 to 12 weeks.
Q. Did he give you a salary that you agreed with him on?
A. Well, when Mr. Provezano interviewed me for the position prior to the time that I said I would take it, I told him that I wanted a minimum of $300.00 a week. Otherwise, I wouldn't be taking the job. He agreed plus a certain per cent of the business that would come in. He agreed to those terms.
Q. Now, was this verbally or in writing, the terms that were reached?
A. It was a verbal agreement.
Q. Now, during this 10 or 12 weeks, how much, in commission, did you make in addition?
A. I wasn't on a commission basis for Mr. Provezano.
Q. You were not?
A. No, I was not. I was hired to manage the office for him and set up the accounts and so forth. When things got going, I would get a certain percentage of the money that came in. I wasn't on a commission basis.
Q. You never did get a per cent of the money?
A. No, I did not.
Q. Now; could you focus in on the specific dates as best you can that you worked for Mr. Provezano?
A. I believe it was either the last week in March or the first week in April. I don't recall, or the second week in April. I don't recall in what period of time I went back to work for him.
Q. In 1973?
A. 1973.
Q. You worked the next 10 or 12 weeks?

A. That's right.
Q. Continually?
A. That's right.
Q. Now, some point in time, you severed your job with Mr. Provezano?
A. That's right.
Q. Could you tell what the circumstances were in which you severed maintaining employment with him?
A. It was personal differences. Pay day was during the week on Wednesday; actually, three days was held up by the clerk. 5 o'clock rolled around and I didn't get my pay. The young lady usually gave me a check every Wednesday evening.
Q. Let me ask you this: Do you remember her name?
A. Her first name was Clara. The last name I don't remember.
Q. Was her last name Knowles (phonetic).
A. She used a few names. I'm not sure what it was.
Q. Now, will you continue to tell us what else happened?
A. Well, I didn't get my pay. I was very upset and I told the young lady to tell Mr. Provezano to come over with my pay or I was terminating the job.
Q. Did you have a conversation with Mr. Provezano?
A. Yes, he called me at my home and asked me to come down to the office where my desk would be there and my check would be there. I think I refused and told him I didn't want to work for him any more. I sent my son down there to pick up my pay.
Q. Now, had you any discussion with Mr. Provezano since that time?
A. One.
Q. When was that?
A. This goes back sometime to last year. I was interviewed by the F.B.I. They were over at my home interviewing me and I was quite upset about it. They were looking for me to talk to me and Frank called me up after the interview. I said that they asked me a series of questions—who worked certain accounts. I said, "You did."
I said, Frank, let's forget the whole issue that they called me up to discuss this. Mainly the last conversation with Frank Provezano amounted to nothing.
Q. How did you get your job with Mr. Provezano?
A. Well, Walter Cox, Mr. Cox worked for Coburn Credit.

Q. When was that?
A. That I guess was several years ago. It's going to be hard to remember right now. It may have been 1972.
Q. Now, how long had you known Walter Cox?
A. I think from Coburn, roughly, we worked together 3 months, tops. That was how long.
Q. Now, you first met him sometime in 1972?
A. That's right.
Q. And now, did you maintain some sort of contact with him since then?
A. On occasion, he would call me maybe once a year or maybe twice a year to say hello, where are you working and so forth.
Q. Okay, Mrs. Jacobs, I want to get some idea of the prior work you have held prior to working with Mr. Provezano; where you have worked and what you did?
A. Prior to this time, I worked for Colonial Customer Operations since I am out here in Long Island. I worked for Franklin National Bank. I worked for the National Educational Products. I started in business, this goes back years in Brooklyn for Melmac Company. They're the broken dishes. You bring these dishes in and so forth.
I have been in the business, this business for the past 20 years. I was also in collection and skip tracing work, that is my forte.
I locate the skips and collect them.
Q. Most of your work is over the phone; is it not?
A. All my work is over the phone.
Q. Now, when you're talking about this business, you have certain terminology in the business that you have been using for the past 20 years or so in conducting your debt collection business?
A. That's right.
Q. Now, can you give us a definition of what skip tracing is?
A. Skip tracing is when people are no longer residing at their home or work or their job, you have to determine where they're living.
Q. Do you have to contact telephone companies and relatives and other sources of information as to achieve the new address or whereabouts of the person?
A. Well, there are ways. There are a lot of different

ways of locating a skip. I couldn't go into it. It would take me hours.

Q. Now, my question is: Do you sometimes call or phone the person's company?

A. No, I don't call the company to locate a skip.

Q. How do you do it?

A. Just briefly, it's pretty difficult. I have the skip card in front of me. It's hard to explain it to you. If you give me a precise account or give me a precise skip account, I would just look at it and I would know where to start.

Q. Now, at some point in time, did you become familiar with the gambling junket accounts?

A. Yes.

Q. When was that?

A. When I worked for Frank Provezano.

Q. Now, was that the first time you ever dealt with such accounts?

A. That's right.

Q. Now, were you given instructions on how to handle such accounts?

A. (No response.)

Q. Did anyone give you any instructions?

A. Yes, my first instruction was to use the tape recording machine. He said to tape everything. Everything you do as far as collection is concerned.

Q. Did you find that Mr. Provezano had a great deal of experience in the collection business?

A. That's a broad question. I don't know exactly what you mean.

Q. Well, did he have as much experience as you?

A. Well, Mr. Provezano hired me to set up an office for him in the collection field. He wasn't experienced in that. I just knew Mr. Provezano for a short period of time. I don't know how much experience he had in the field.

Q. Now, you say you were instructed as to tape recording conversations?

A. Right.

Q. Were these just gambling accounts?

A. I had only three or four gambling accounts for Mr. Provezano.

Q. Did you tape all your conversations?

A. No.

Q. Why not?

A. Because I found it annoying to have to tape on my ear and I felt uneasy.

Q. Did you tape record any of your conversations?

A. About these accounts, there were. There were a couple of conversations that were taped. I don't think I was talking directly to the party involved. I don't recall. I know that Mr. Provezano asked me to use the tape recorder several times.

Q. Now, what did you do with the tape, if anything?

A. The tape belonged to Mr. Provezano.

Q. Did you give him the tapes of the conversations?

A. He took the tapes.

Q. Now, you say that there were 4 tapes?

A. I didn't say 4 tapes. I said that they were originally for the 3 or 4 markers I worked for Mr. Provezano.

Q. Were you successful in any of these accounts?

A. I was out one day and Mr. Provezano told me that somebody was coming up that particular day to pay off one of the markers. I believe he had gotten a check for it.

Q. Do you remember the name of the individual?

A. No, I do not.

Q. Did you ever use your name Jacobs, when calling on these gambling accounts?

A. At times, I did.

Q. You used the name Mrs. Kramer?

A. Yes, I did.

Q. Did you use any other names other than Mrs. Kramer?

A. I don't recall.

Q. Now, does the name Dave or Jeff Woods mean anything to you?

A. Yes.

Q. In what connection?

A. Dave and Jeff Woods, they're representatives of Circus Circus up here in New York.

Q. Have you ever met them personally?

A. No, I have not.

Q. Have you ever talked to them on the phone?

A. Maybe once or twice. I don't know when it was.

Q. Now, in what connection did you have a conversation with them over the phone?

A. Mr. Provezano would ask me to call Mr. Woods regarding an account that we were trying to collect for him. I don't recall the conversation now.

Q. Do you remember that account?
A. Yes.
Q. What is the name of that individual?
A. Stonesiefer.
Q. Did you ever have a conversation with Dave Woods or Jeff Woods?
A. I don't think it was the son. I don't recall who it was, whether it was the son or the father. If I have spoken to them twice, it's a lot.
Q. Now, Jeff Woods was the son and Dave Woods was the father? You had a conversation with Dave Woods?
A. I think so.
Q. Now, was it about the Stonesiefer account?
A. I don't recall. It might have been about that account or Mr. Provezano asked me to call. He asked me to talk to him about the account or something. I don't recall.
Q. You were not in the habit as acting as a secretary for Mr. Provezano were you; taking and making calls for him?
A. Yes, if Mr. Provezano wanted help and he wanted me to call someone to get someone for him on the telephone, we shared the same office, I would.
Q. Did this happen quite often during the time that you were there?
A. He would come in and leave at various times during the day.
Q. Did he have any other job?
A. He told me he had a job on weekends as a bartender. I don't recall the name of the place.
Q. Do you recall having any conversation with Dave Woods?
A. I don't recali because I know it wasn't a very important conversation, otherwise, I would remember.
Q. Did you have anything to do with referring over any of the gambling accounts?
A. You'll have to be more specific on that question.
Q. Did you have anything to do with referring over of the Stonesiefer account?
A. It was given to Mr. Provezano to collect from David Woods.
Q. Do you have any information as to whether Mr. Woods ran junkets to any other places besides Circus Circus Hotel in Las Vegas?
A. No, I have no idea.

Q. Now, did you ever receive any information that he ran junkets to Puerto Rico?
A. I have no idea.
Q. Did you know that gambling debts were not legal, that they were not legally endorsable?
A. Yes. There is no legal endorsing of them in the United States.
Q. Did you, at the time you started working on these gambling debts, these debt accounts, for Mr. Provezano, know that?
A. I thought that a check would be legal, endorsable here. That was my impression by Mr. Provezano. I never discussed it with him.
Q. Did you ever see a gambling marker?
A. Yes, quite a few.
Q. Did Mr. Provezano have some in his office?
A. I don't recall now if Mr. Provezano had the originals of the 3 or 4 accounts that were handled and photostated. I don't recall.
Q. Now, have you ever seen either copies or originals of the markers?
A. Yes.
Q. Now, was it your impression that such a document could be legally enforceable in a Court of Law?
A. I knew that markers were not legally enforceable. It was my own determination. I thought that checks were.
Q. Did you ever receive any checks?
A. No, not from Mr. Provezano. But from Mr. Cox I have seen checks.
Q. That is gambling checks that junket customers have written?
A. Yes, they're checks instead of markers. That is correct.
Q. Let me ask you this: Could you tell me some of the techniques you used on the phone with regard to the checks, of bad debts, you have used in the business in the 20 years. Can you give me and the ladies and gentlemen of the Grand Jury some idea of how you approached that, what you would use to approach someone that had not paid a debt, just generally, what language would you use?
A. Well, I contact the party on the telephone, introduce myself and say who I represent. I would tell them that theirs is an honorable debt that is owed to the casino. Don't you think it's time you should pay it. I would say

that 80 per cent of these people that I called, when working on these marker accounts——

Q. Yes.

A. (continuing) I would appeal to their sense of fair play and I would say that these were honest debts and I would tell the people, I would tell them that it has been several years and they should pay their debts, their obligations.

Q. Suppose it was an ordinary debt and it was referred from some place, some store had reneged on payment and somehow the debt was referred to Mr. Provezano or Mr. Cox, and then Mr. Provezano or Mr. Cox turned the collection over to you; what would be your approach to someone in that case, than for a gambling debt?

A. There is no other approach.

Q. You would never use any threats on these people?

A. You'll have to be more specific on that. I may have gotten excited a few times, but I have never threatened anyone. I might have gotten exited at some people quite a few times.

Q. Have you ever said, we are going to take you to Court?

A. What are you making reference to?

Q. I'm talking about the whole gambling bit, the debt collection that you were engaged in over the years. If I was trying to collect on something that somebody owed me, let's say on a refrigerator or a retail installment paper, as you would put it, on an installment loan I would call them up and ask them for the money and try to make some terms, like split it over a period, a short period of time and if they would just absolutely refuse to pay, I would just tell them, if you don't pay, you leave me no choice but to go ahead and take out a Summons and referring this to the legal department where I am working and they would serve you with a Summons. Did you ever do that with the gambling check accounts, when you were working for Mr. Provezano or working for Mr. Cox?

A. There were 3 or 4 accounts I spoke to. One of the parties actually came up to the office when I wasn't there.

Q. Let me focus on one point. Now, Mrs. Jacobs, you would not use the technique of threatening legal action because you know it wouldn't be enforceable?

A. I want you to understand I didn't find out about that until much later.

Q. Well, you know about that now?

A. Yes.

Q. Did you ever tell people on the phone that you are going to send collectors out to see them about the collection of the accounts?

A. Yes, I think I would have told people that.

Q. Now, did you follow through and do it?

A. That's where I would refer it to Mr. Cox. I would bring it up to him and see what he wanted to do with it.

Q. Do you know whether he or Mr. Provezano that is, send two guys or one guy to see the person or individual to try to get the collection in person?

A. To my knowledge, I don't know if Mr. Cox ever did. I don't know if there was anybody employed by the company that he would send out that way.

Q. So, it was an idle threat? So, when you said somebody would come over and see you, you were trying to say——

A. Many people would go out on the cold cases to pick up money.

Q. Now, did you ever make any threats that you're going to call their relatives, like their wife, their mother, or their brother or anyone else in their family with regard to the debt?

A. I don't recall. I don't recall if I would say something like that.

Q. You don't recall?

A. No, I dont recall.

Q. Have you ever said that someone was going to get hurt?

A. Never.

Q. Never?

A. Yes, never.

Q. Now, did Mr. Provezano ever tell you specifically not use any kind of threats?

A. Yes.

Q. When was that?

A. Well, it was a short period of time that I was working for him. He said, "Don't threaten anyone on the telephone." That was the only conversation we had.

Q. Now, was that in the beginning of your association with him or towards the end?

A. Near the end of it. In the beginning, we didn't have the Vegas accounts. It was towards the end that he may have brought in 3 or 4 Vegas accounts.

Q. Now, was there an account with the Meadowbrook Hospital that you worked on with Mr. Provezano?

A. Yes.

Q. Could you tell us about that?

A. That is one of the reasons why I was hired by Mr. Provezano. At the time of the interview, he told me that he expected this very large account from a hospital. I didn't know the name of the hospital at that time.

It was towards the very last, I would say, 3 or 4 weeks that I was working for Mr. Provezano that the hospital accounts came in.

Q. And, wasn't there an argument or disagreement with Mr. Provezano over handling of the accounts?

A. No.

Q. Did you handle the hospital accounts?

A. Yes.

Q. Successfully?

A. Yes.

Q. And now, were these large or small accounts basically?

A. Basically?

Q. Yes.

A. Very small.

Q. Now, didn't you say to him they were not worth your time, it was not worth your time in engaging in the tracing of such small balances or accounts?

A. I did not say that. I told him frankly these $10.00, $12.00 balances, I would hire somebody else to do this work. I felt, for a long time, that my forte was—I liked to work large balances and home improvement paper. Any collector can work on accounts for $25.00 and $15.00. It wasn't an argument.

Q. Was it a disagreement, would you say?

A. It was just a discussion.

Q. At some point in time, did a discussion occur of some accounts at various Times Square Stores?

A. I don't exactly understand what you mean by that. Times Square didn't have their own collection department. It was not worth their while to go out and make an effort to collect from these accounts.

Q. Do you remember discussing the Times Square Store accounts with Mr. Provezano?

A. When I started working for Mr. Provezano, all he had in his office was maybe 30, maybe 20 Times Square Store accounts.

Q. Now, basically, what were they?

A. They were all bad checks from Times Square.

Q. Now, they were various business checks from Times Square?

A. No, they weren't business. They were just people purchasing items and writing bad checks. They may have said to Mr. Provezano, I don't know how they can afford business just with the Times Square Store accounts. They don't have enough work to make sufficient money on it. There were only 20 or 30 accounts and when they sent in accounts, they may have sent in another 10 to 12.

Q. Now, what did he say, if anything?

A. Don't worry about it.

Q. Did he instruct you to go ahead and work on these accounts?

A. Yes.

Q. Now, at any point in time, did you ever see Mr. Provezano with a gun?

A. Mr. Provezano was licensed to carry a gun.

Q. Would you describe the gun? Was it a hand gun or a rifle, can you give some general description to the Grand Jurors?

A. I don't know that much about guns. It wasn't a rifle. He carried it in his belt.

Q. Did he ever draw it out of the holster?

A. Yes. He had a picture of Frank Sinatra in his room and he would take the gun in his hand and I though maybe he was imitating Frank Sinatra.

Q. Did he ever say anything to you about the use of the gun?

A. No, nothing other than he had a permit and he showed it to me.

Q. He showed the permit to you?

A. Just the picture he was showing me.

Q. Were you afraid of the gun or Mr. Provezano?

A. Well, I'm afraid of anyone who carries a gun that has bullets. Yes, I would be petrified.

Q. Did he ever point the gun at you?
A. No.
Q. At any time, in your presence, did he point the gun at you?
A. No.
Q. Did he ever use the name Frank Pro?
A. Yes.
Q. Now, would he use that name when he was talking to people over the phone?
A. Yes.
Q. Do you know of anyone named Anthony or Tony Pro?
A. No.
Q. Do you have any idea if Mr. Provezano was claiming or giving you the impression that he had connections with any criminal elements——
A. You would have to be more specific on that.
Q. The Mafia?
A. I don't know that there was a Mafia.
Q. Well, is he connected——
A. I'm under the impression that Mr. Provezano, that he was a nephew of somebody.
Q. Did he tell you that?
A. Indirectly.
Q. Can you recall the exact words he used?
A. No, I cannot.
Q. Now, of these 3 or 4 gambling junket accounts, that you were handling for Mr. Provezano, how many individual telephone calls would you say you made on the Stonesiefer account?
A. On the Stonesiefer account, I may have made 20, 30, 40 calls.
Q. To whom and what people?
A. I don't recall at the present. Harry Stonesiefer was a skip. He originated out here in Long Island and he left his job in a laboratory. I would just keep on working and working until I could try to locate Harry Stonesiefer.
Q. Now, did you call William or Bill Stonesiefer?
A. I don't recall the first name.
Q. Bill is the brother of Harry?
A. Yes, I did.
Q. How many times did you call him?
A. Several times.
Q. Did you call his ex-wife named Pamela Stonesiefer?

A. I believe I spoke to her. I don't recall.
Q. Now, did you call his cousin that may have been located in North Carolina or South Carolina?
A. Yes.
Q. Did you call his mother that may have been located in Gettysburg, Pennsylvania?
A. Yes, I did.
Q. How many times did you call her?
A. It may have been two or three times.
Q. Did you talk to Harry Stonesiefer himself?
A. No, I never did.
Q. You never did?
A. Never did.
Q. And now, do you recall the name Mr. Coper?
A. Yes, I do.
Q. In what connection?
A. I located a job where Harry Stonesiefer supposed to be working and Mr. Coper is who I spoke to.
Q. Now, was there a laboratory?
A. Yes.
Q. Where was that?
A. In New York, I don't remember where.
Q. How many calls would you say you made on the three gambling junket accounts?
A. I'm not sure. I would say about 3 or 4, at the most.
Q. Do you know Frank Atempa?
A. Yes.
Q. Did you make any calls to him?
A. The name sounds familiar. I don't recall. The name sounds very familiar on the collection accounts.
Q. I have a list of various gambling junket accounts that I would like you to look through briefly. Just look at the names, let the record show that this is a various list that was previously marked as Grand Jury Exhibit #12 on May 6, 1974.

Mrs. Jacobs, I would like you to use this list that has been previously marked as Grand Jury Exhibit #12, and give me any of the names that strike you as being familiar, that has a familiar ring to you?

A. Robert Brendel, sounds vaguely familiar to me. I want you to keep in mind I'm not going to say I don't recall. I worked some of these accounts. I only worked for 2 or 3 or 4 weeks at the most for Mr. Provezano and these

names would be very hard for me—there is John Cecere. I had spoken to him on the telephone when I worked for Mr. Provezano. He had agreed to pay $1,500.00 and coincidentally, he came up the day I was out. I was supposed to get a minor operation done. I remember I was out of the office and he was supposed to come up that morning. Mr. Cecere was coming up to pay on the markers and I know that Frank was a little nervous. When I had gotten back there, Mr. Provezano told me that Mr. Cecere was up and he gave him $1,500.00.

Q. Now, you never saw the transaction yourself?

A. No, I couldn't. That's one of the days I was out. Here is Harry Stonesiefer.

Q. Do you recognize any other names on the list?

A. Yes, Dick Durso, it sounds familiar. That may have been one of Mr. Cox's accounts.

Q. I have another list, Mrs. Jacobs, that has been previously marked as Grand Jury Exhibit #21 on May 6, 1974, these have to do with the gambling check accounts from Prompt Reports.

I wonder if you would look at these pages and the names on the list and tell me what names are familiar to you?

A. You handed me a list that came from Mr. Cox. I'm not quite familiar with it. I can't say that I ever heard of anyone of these accounts. I'm not quite familiar with the list. I wouldn't say that I had spoken to anyone of these. I don't recall, there are too many.

Q. Did you help in the preparation of these lists?

A. I had got all the listing together and I had given them to the girl to type. I didn't do the typing. I got it together and gave it to the girl to type out.

Q. Were you employed by Mr. Cox at that time?

A. Yes, I was.

Q. That would be the beginning of May of this year?

A. Yes, I want you to know that I left Mr. Cox and he called me to come back.

Q. Did you discuss with Mr. Cox after his appearance before this Grand Jury?

A. I was quite anxious to find out how he made out. I asked him, "How did things go?" He said, "Fine and no problem. We are clean. They know we are clean. I didn't do anything unethical in that office."

Q. Did you aid in the preparation of any other document

that may have been subpoenaed by the Grand Jury other than this list?

A. You'll have to be more specific.

Q. Were there any other documents, did you see any subpoenaed documents or did you assist in completing this Grand Jury Exhibit, assisting Mr. Cox in making up this list——

A. You're confusing now. I'm saying things I don't know. I aided Mr. Cox in making up the list that he needed. I aided in making the list and we worked together and the girl typed it out.

Q. To the best of your recollection, did you make phone calls to the bulk of the people on these lists?

A. Not on the bulk. On some of them. I wasn't the only person in the office.

Q. Now, I want you to have a look at this Grand Jury Exhibit at this time. Just look at the names on the list and tell me which of these names you recognize or you participated in telephone calls with. We'll give the name to the reporter and spell the last name.

A. This is very difficult.

Q. Just do your best.

A. Do my best? Right now, I'm quite nervous and a little warm. It's very hard to pinpoint the names.

Irwin Milstein. Morton Feldman. Marvin Bernstein. I may have spoken to a few others and I'm trying to remember them.

Q. I want you to give me the names of the parties you have spoken to——

A. I have spoken to quite a few. There's Cross, I know I had spoken to him once. Bernard Backer. Sheldon Greenberg. I have spoken to Anthony Riccardi. I spoke to his wife, I never spoke to Anthony Riccardi. I spoke to Klotz, Chandler is his first name. Chandler Klotz. Louis Cohen. Frank Timpa.

Q. How many times did you speak to Mr. Timpa?

A. You're being very difficult.

Q. More than once?

A. Yes, Mr. Timpa was supposed to take care of the collections. I spoke to him twice. I would have spoken to quite a few of these people at one time or another.

Q. Will you continue. You're doing very well.

A. Dave Brill——

Q. Give us the names you recall——
A. Irving Schapiro. I remember trying to sue him.
Q. You tried suing him?
A. Yes.
Q. Was that for a gambling debt?
A. I think it was for a check. There's Quinn.
Q. Is that Quinn Alenzo?
A. He goes under both names. There is Joe Rotterman.
Now, I'm just giving you the names that I remember speaking to. I may have spoken to other people. I'm just giving you the names I recall offhand. Sam Pitofsky. There is Marilyn Shih-shih. There is also Les Hanzey.
Q. Let's go back to Marilyn Shih-shih, there is the amount of $25,000.00, do you recall that?
A. Quite well.
Q. That's the type of accounts you like to handle——
A. You're putting words in my mouth. You're letting the Jury believe things. The $25,000.00 is a gambling debt.
Q. Now, how many calls did you make on this account?
A. I have spoken to her. She lives in a penthouse here in New York and I have spoken to her several times.
Q. What did she say in response to your call?
A. I called her about the debt and the money she owes and she was very disturbed that anybody would call her asking her for money and she gave me the impression as to who was I, an agency, to ask her to pay the hotel. She said when she's ready, she will pay. I told her that the $25,000.00 was an honorable gambling debt. She owes all the hotels. Beside that, this woman lives in a penthouse in New York. She say she'll pay when she's ready and not to disturb me.
Q. What does she do for a living?
A. I don't think she does anything for a living. She is quite wealthy and she owns a penthouse on Fifth Avenue. Where she gets her money, I don't know.
Q. Did you talk to anybody else with regard to her debt or just her; any relatives?
A. No, unless I would go into China.
Q. Let's get back to the rest of the list. Do you see any other account?
A. Yes. Les Hanzey—that sounds familiar.
Q. Now, Carey (phonetic)—the Carey account says paid $800.00 of his $1,800.00 debt; do you recall anything about it?

A. The hotel agreed to settle it for $800.00. $800.00 out of the $1,800.00, the amount the account owed the Desert Inn was $1,800.00. We collected $1,000.00 and settled the debt. We put down a balance due the hotel and the hotel agreed to settle for $1,000.00.
Q. With regard to Les Hanzey, $6,000.00 debt, $3,000.00 was collected; was that the amount of the settlement?
A. No, $3,000.00 is still owed on that account.
Q. Do you have anything to do with the collection of the $3,000.00 of the $6,000.00 owed?
A. I located Les Hanzey in Texas.
Q. Did you get a commission?
A. No, I did not. When I located him, Mr. Cox spoke to him. When I located his business in Texas, Mr. Cox spoke to him and collected the money.
Q. Did I ask you if you worked on a commission basis?
A. I did not.
Q. You worked on a straight salary?
A. I was hired as an independent worker. I would come in and vary my hours. I would come in when I felt like. Mr. Cox would be liberal. If I worked an hour—for example, Les Hanzey, originated in Texas and I never spoke to Mr. Cox. Mr. Cox collected the money.
Q. Do you have any idea if Mr. Cox used a tape recorder to tape record conversations?
A. No, I did not. I saw Mr. Cox with a tape recorder come into the office all the time. I have known him to use it, but I don't know what for.
Q. Have you been in there on occasions——
A. He never kept a tape recorder apparatus. He never kept a tape recorder in his office and I saw him using a tape recorder once in all the time I had known him.
Q. Did he ever discuss with you taping telephone conversations?
A. No.
Q. He never discussed it with you?
A. No.
Q. Now, the F.B.I. interviewed you on September 13, 1973, and you said during that conversation that Mr. Provezano told you "You threaten me, kid, and you won't walk the street", do you recall conveying that information about Mr. Provezano to an F.B.I. agent?
A. Yes, I do.

Q. Could you tell the Grand Jurors how that threat came about against you from Mr. Provezano?

A. To be very honest with you, I'm not a personal friend of Frank Provezano. I'm not looking to excuse it. I'm just saying that I'm a mature woman and truthfully, I don't think that Mr. Provezano meant it. He did say it. When people get into a fit of anger, they will say things that they don't mean.

Q. But he said it?

A. I believe it was in a fit of anger. When you get anybody mad, they say lots of things that they don't mean.

Q. Mr. Provezano appeared before this Grand Jury and I believe Mr. Herbert Croll, who is an attorney at law, that Mr. Croll called you on the telephone; is that true?

A. Mr. Croll did not call.

Q. Mr. Croll never called you?

A. Well, I remember speaking with Mr. Croll.

Q. Can you tell the Grand Jury what transpired?

A. Mr. Croll called me and told me—he introduced himself as Mr. Provezano's attorney. He told me that his client had a subpoena from the Grand Jury and if I could come down to his office to see him.

Q. And, what did you say?

A. I told him I would definitely not come down to his office to see him. Even if his client received a subpoena. What did I have to do with his client? What is it all about.

Q. Now, was there a further discussion with you on the telephone with regard to the conversation with Mr. Croll?

A. Well, I was getting a little excited. I thought it was a little unusual to tell me to come down to his office and so forth.

Q. Now, what else transpired?

A. That's all. I asked him to call Frank Provezano. Nothing else transpired. Maybe a few more words. Minor words. Nothing else.

Q. Now, sometime during your work on the Stonesiefer account, did you find out that Harry Stonesiefer was alleged to have leukemia?

A. No.

Q. You never did?

A. No.

Q. Did you ever discuss with Harry's brother who we know as William or Bill Stonesiefer, the fact that his brother was dying?

A. Never. The first time I know of it is now.

Q. I'm going to read some direct quotes to you, Mrs. Jacobs, and I want to know whether or not you said them?

"MRS. KRAMER: Well, you know what's going to happen to him one of these days.

BILL: Well, he's going to die and now that's besides the point.

MRS. KRAMER: Sooner than he expects.

BILL: No, I don't.

MRS. KRAMER: Sooner than he expects.

Maybe it's going to be painful to be honest with you."

A. I never said that.

Q. Are you absolutely positive that you never said that?

A. Absolutely positive.

Q. Now you're under oath——

A. I never said that.

Q. You never said to anyone these words, "Maybe it's going to be painful, to be honest with you."

A. I never said it. I know I'm under oath.

Q. Now, did you know the statute of perjury?

A. Yes, I never said that.

Q. We'll continue.

"BILL: Well, you know it's got nothing to do with me.

MRS. KRAMER: I mean it's really a shame, but he's gonna get his pretty soon, just a matter of hours to be honest with you and as I told you, I'm being honest with you. We didn't like going to the mother, but we will.

BILL: Well, you know."

Q. (continuing) Do you recognize those words?

A. Not exactly.

Q. You had some sort of conversation?

A. By the way of saying I wish you could contact your brother.

Q. Did you say, "What he's going to get his pretty soon"?

A. I did not.

Q. You absolutely deny that statement?

A. Yes. I deny it.

Q. I'm going to continue.

"MRS. KRAMER: In effect, somebody will probably take a ride up sometime this afternoon.

BILL STONESIEFER: Well, what can I tell you?

MRS. KRAMER: What can I tell you?

BILL: Yep.

MRS. KRAMER: I'm being honest with you.
BILL: I thank you."

Q. (continuing) Do you recall saying to Mr. Stonesiefer that somebody may take a ride up?

A. I think there may have been two guys that went up to collect. Mr. Provezano had these two guys, I don't know their names.

Q. Do you have an idea if that was Jeff Woods, whether he made any effort to collect on the Stonesiefer account?

A. I would assume so. They were representatives of a hotel that handled junkets here in New York. They gave out Markers and it was up to them to collect.

Q. Did they try to collect from the Stonesiefer account.

A. Yes.

Q. Now, do you have any information that they made a personal visit?

A. None whatsoever.

Q. Or that they threatened to break heads?

A. I wouldn't know.

Q. Do you have any information either from Mr. Provezano or from Mr. Woods himself?

A. I never had.

Q. Are you saying, "No"?

A. The answer is no.

Q. How much did you earn in 1973?

A. I don't recall.

Q. Did you file Federal Income Tax Return for 1973?

A. I don't know. My husband and I, we file a joint account. I don't take care of it.

Q. Well, you sign a joint return, didn't you?

A. Well, unless we didn't file a joint return.

Q. What was your total income?

A. I don't recall.

Q. Can you give us an approximate figure?

A. I don't recall.

Q. Do you recall how much you earned in 1973?

A. I don't recall. If you would like me to, when I go home, I can look up the W-2 form.

Q. Did you receive a W-2 from Mr. Provezano?

A. Yes.

Q. Also from Mr. Cox?

A. No, I didn't receive one from Mr. Cox.

Q. How much money did you earn from Mr. Cox, the year 1973?

A. I was with him a very short time, as I told you. I was employed as an independent worker, not on salary.

Q. Okay. Are there any questions from the Grand Jurors?

JUROR: Mrs. Jacobs, I'm curious as to one thing. For the number of different corporations, businesses, why did you go under so many different names?

THE WITNESS: Well, yet me put it to you this way: When I work for companies, I use my right name. At other times, when I work on agency accounts, marker accounts, I use the other name. I tell people because people threaten your life, so you don't want to use your own name.

JUROR: If they really want to find out who you are, they probably would with no problem.

THE WITNESS: You're probably right.

JUROR: If you don't want to give your right name, let them call you at the business.

EXAMINATION BY

MR. WEINER:

Q. Can you tell us what names you heard Mr. Provezano use on his telephone calls?

A. He used the name Hunter. It may have been James Hunter. Maybe James. I don't recall the last name.

Q. Do you recall the name Mr. Martin?

A. The name has been mentioned several times. It has been mentioned several times by some other people.

Q. Do you recall that name?

A. I don't know. I think it was a fellow who worked for Mr. Provezano at one time.

Q. Do you recall the name Carey Eferstein?

A. The name was mentioned when I was questioned by the F.B.I. They mentioned the name and they asked me whether I heard of the name. I never heard of it.

Q. Was Mr. Eferstein's name brought up by Mr. Martin?

A. Right. He brought up the name and that's when I heard it.

Q. Mr. Provezano never mentioned that name to you?

A. No.

Q. How about anybody else?

A. No.

Q. Now, Mrs. Jacobs, I would like to keep you under the subpoena of the Grand Jury. I don't think it will be necessary to call you back, but if it is, we'll notify you.

A. Okay.

THE FOREMAN: You're still under the subpoena of the Grand Jury. If there are no further questions, you're excused at this time. Thank you for coming.

(Whereupon, the witness was excused and withdrew.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
..... X

UNITED STATES OF AMERICA — Criminal Folder #

—against—

ESTELLE JACOBS, ET AL
..... X

225 Cadman Plaza East
Brooklyn, New York

November 4, 1974

GRAND JURY MINUTES

Presented by:

EDWARD C. WEINER, ESQ.,
Special Attorney
Department of Justice

Reported by:

Elizabeth A. Ng

Witness:
ESTELLE JACOBS

ESTELLE JACOBS, having first been duly sworn, assumed her seat as a witness and testified as follows:

EXAMINATION BY

MR. WEINER:

Q. Would you state your name for the record, please.

A. Estelle Jacobs.

Q. Mrs. Jacobs, do you have a middle name?

A. No.

Q. I believe you appeared before this Grand Jury on June 10, 1974, is that correct?

A. That's correct.

Q. At that time, Mrs. Jacobs, I explained to you your various Constitutional rights.

Do you have any questions now about those rights?

A. No.

Q. Let me briefly go over them. The first right you have is the privilege against self-incrimination to refuse to answer any question that might tend to incriminate you.

Do you understand that right?

A. Not fully.

Q. Let me explain it to you. You have the right to refuse to answer any question that might tend to lead or tend to give incriminating information against you. It's a personal right that applies only to the person who's testifying. It doesn't apply to incriminating information against any other individual who we might ask you about.

If there's any question that you feel might offer information or evidence that might be contrary to your position, you tell us and you won't be forced into answering that question.

Do you have any questions about your privilege against self-incrimination?

A. No.

Q. The second right you have is the right to counsel. The right to have an attorney represent you outside the Grand Jury room.

Do you have an attorney representing you today?

A. No.

Q. Do you feel the need of one?

A. No.

Q. If at any time you would like to interrupt the proceedings and call an attorney, let us know and you will be given the opportunity.

A. There is one question as to Mr. Weiner—

Q. Yes.

A. I'm here and you are asking me if I feel—I don't know why I'm here, Mr. Weiner, to be very honest with you. You are implying do I feel, do I need an attorney. I have asked you repeatedly why am I here.

Q. You are a subject of this investigation, Mrs. Jacobs.

A. I told you everything I know, Mr. Weiner.

Q. I have some additional questions and that's why you're here today.

Will you tell us if you would like to call an attorney and at that time you will be permitted to do so, if you would like.

Do you understand that?

A. Yes, I do.

Q. Finally, I want to tell you that there are Federal laws against perjury, for telling untruths while under oath.

Do you understand those laws?

A. Yes, I do.

Q. Do you understand that you are under oath at this time?

A. Yes, I do. Do you mind if I smoke, Mr. Weiner?

Q. You may.

Mrs. Jacobs, I have your date of birth but not your place of birth the last time.

Could you give us that?

A. Brooklyn, New York.

Q. And are you presently employed?

A. Yes.

Q. Could you tell us your place of employment?

A. I work for an attorney in Garden City, Fleck, Fleck and Fleck.

Q. Give us the spelling of one of the Flecks.

A. F-L-E-C-K.

Q. What duties do you have with Fleck, Fleck and Fleck?

A. The duties I have with Fleck, Fleck and Fleck, I was hired to work on collections.

Q. Do you do all the work over the phone?

A. Yes, I do.

Q. Are they basically accounts of the law firm or are they other accounts?

A. Other accounts.

Q. Could you give us an idea of what types of accounts they are?

A. Fleck and Fleck was never in the collection business before. I'm only working for them several months. They just obtained A&S accounts. They just went in the collection business. They just went into the collection business and I work on A&S accounts, Abraham & Straus.

Q. That's a retail clothing store?

A. Department store, right.

Q. Department store?

A. Yes.

Q. And you have worked for them for several months?

A. That's correct.

Q. What are your earnings at Fleck and Fleck?

A. My earnings in Fleck and Fleck, $175.00. Well, actu-

ally $150.00 with a commitment of $175.00 at the end of this week.

Q. Do you get commissions as well?

A. No, I do not.

Q. Prior to your employment there, where did you work?

A. I worked for Walter Cox, Prompt Reports.

Q. How long did you work there?

A. I worked for him part time off and on for a few months.

Q. I don't think I asked you the last time what your earnings were at Prompt Reports or what arrangements there were.

A. Arrangements, I'm not going to answer that question.

Q. Why is that? You are asserting your privilege against self-incrimination?

A. That's correct.

Q. You want to tell us your earnings at Prompt Reports?

A. No, I don't.

Q. Same reason?

A. Same reason.

Q. Have you talked to Mr. Cox recently?

A. Yes.

Q. When?

A. I don't remember the date, I talked to him off and on.

Q. After you were notified to appear here for this session of the Grand Jury?

A. After I spoke to you, Mr. Weiner.

Q. Yes.

A. Yes.

Q. What was discussed?

A. What was discussed? I told him that you had called me and I was subpoenaed again before the Federal Grand Jury. What in God's name do they want from me?

Q. What did he say?

A. In plain words.

Q. What did he say?

A. What he said? I'd rather not repeat what he said, Mr. Weiner.

Q. You are under oath, Mrs. Jacobs.

A. I'm trying to think of what words he put into it. How did he put it? He feels the whole thing is an injustice and why I'm here and he was here. He doesn't understand why, to be very honest with you.

In fact, I told him, Walt, I call him Walter. I said I'm a pretty good investigator myself and at this particular point I'm being prosecuted by going up before the Federal Grand Jury, humiliated by going up before the Federal Grand Jury. I would like to know what this is all about and if I don't know, I'm going to find out myself and call a few people.

Q. Did you call a few people?

A. Did I call a few people? Yes. I called Frank Provenzano.

Q. What was discussed with Mr. Provenzano?

A. I didn't get him on the telephone. His number was disconnected and that's just what I intended doing, Mr. Weiner, is do my own investigating and find out why I'm here.

Q. Prior to your working for Mr. Cox, where did you work?

A. I was with Provenzano for a few weeks.

Q. Ten or twelve weeks?

A. Approximately.

Q. And what was the name of his business?

A. I believe—I'm not too sure. It was Check Adjustment Bureau.

Q. Did Mr. Cox introduce you to Mr. Provenzano?

A. Yes, he did.

Q. Shortly thereafter you went to work for Check Adjustment Bureau?

A. That's correct.

Q. Did you ever know Mr. Provenzano by the name of Frank Pro, last name?

A. That's what he calls himself. Frank Pro. Just in the office people address him as Mr. Pro.

Q. Did you call him that?

A. No. Mr. Provenzano or Frank.

Q. Did he ever according to any documents or that you saw or telephone conversations that you overheard, did he ever use that name in soliciting or talking to collection accounts?

A. Not that I remember.

Q. Did you ever see that name on any letters that he might have written?

A. What name?

Q. Frank Pro?

A. No.

Q. Now, we asked you about this before. Did you have any information from Mr. Provenzano that he was connected to any people in organized crime?

A. Do I—you want to repeat that question?

Q. Did you have any information anyway you could have gotten it that Mr. Provenzano was connected, related, associated with any people in organized crime?

A. I don't have—no. No. No. The answer is no.

Q. Did Mr. Provenzano carry a gun?

A. Yes.

Q. Did he carry it with him at all times?

A. I used to see him in the office with the gun quite frequently, yes.

Q. Did he ever go out on visits to those people who might have owed money and have accounts in your office?

A. To my knowledge?

Q. Yes.

A. When Mr. Provenzano left the office, I didn't know where he went.

Q. Did you ever see him leaving the office with the gun still on him?

A. Well, he came into the office with the gun. He didn't leave it there. He left with the gun.

Q. Did he ever say he was going out to make collections? Did he ever tell you that he was going out to make some collections?

A. He never told me where he was going.

Q. Do you know if Mr. Provenzano used any other names in working accounts?

A. He used the name Mr. Hunter.

Q. James Hunter?

A. I don't remember the first name.

Q. Did he tell you why he used that name?

A. No.

Q. How do you know he did use it?

A. Well, on his desk the name Hunter was on his desk. Little name plate.

Q. Name plate?

A. Yes, on his desk. I think it said Hunter, Mr. Hunter. I'm not sure.

Q. Did you ever overhear him making any contacts over the phone using that name?

A. Frank Provenzano and I worked in the same office. His desk was in the same office as mine. I never listened as God is my witness, any time Frank was on the telephone to what who he was talking to, what he discussed.

Q. You never casually overheard anything?

A. I was never interested. I was always doing my own work.

Q. Do you know if he ever used the name Mr. Morta?

A. Not to my knowledge.

Q. Do you know what that means in Italian?

A. No.

Q. M-O-R-T-A?

A. No.

Q. How did Provenzano get into the gambling debt business, do you know?

A. To my knowledge I'll tell it to you in my own words. I went to work for Frank and supposed to run the office and so forth and he supposed to get this very large important folio in hospital accounts in the Nassau County Medical Center and while I was working for Frank, he said something to me about Vegas accounts. He called—in fact, he had me call a gentleman, Dave Woods, outside looking up in the phone book to see Circus Circus and certain hotels there managers and he had called a few of them and went down to see them and he came back with a couple of accounts from Circus Circus and that's how I know he got into it and then he made a trip while I was still with him to Vegas.

He mentioned prior to the trip, he mentioned to me and I'm telling you everything I know, prior to the trip he mentioned to me that he was waiting for some Vegas accounts which I mean, I'm really surprised. I didn't even know that he was going to get Vegas accounts and worked it. He said he didn't get it and he was going to Vegas on his own.

Q. Did he make more than one trip to Las Vegas during the time you were there?

A. During the time I was there, no. Just one.

Q. Do you know a Mr. Cooperman?

A. Yes.

Q. Who is he?

A. Cooperman at the time represented Check Adjust-

ment Bureau as their attorney. He was the attorney for Check Adjustment Bureau. Anything that had to be sued, I referred over to Mr. Cooperman.

Q. Do you know if he made the trip with Mr. Provenzano?

A. Yes, I was told that he was going with Mr. Provenzano.

Q. Now, you said that you contacted Dave Woods yourself or looked his name up in the phone book?

A. Right. I met Mr. Woods outside in the hall and I remember he had me call a few—see if I could make an appointment and the only one that he did make an appointment with to see coincidentally was Mr. Woods in Circus Circus.

Q. Was it the first time you met Mr. Woods?

A. Right.

Q. You talked to him on the phone, however?

A. Once I even said that to Mr. Woods. You probably don't remember. I spoke to him on the telephone.

Q. Did he say he remembered?

A. No, he didn't make a comment.

Q. Do you know a man named Frank Steiner?

A. Yes.

Q. Who is he?

A. Private investigator.

Q. Did he have any association with Mr. Provenzano?

A. If Frank Steiner had any association with Mr. Provenzano, I don't know. I have never seen him in Mr. Provenzano's office.

Q. How about with Mr. Cox?

A. I've seen—that's how I know Mr. Steiner through Mr. Cox's office.

Q. And what association did Mr. Steiner have with Mr. Cox?

A. What association did Mr. Steiner have with Mr. Cox? He was a private investigator which I assume he is still a private investigator and he used to bring in work, credit reports for Mr. Cox to do.

Q. Did you know that Frank Steiner was a retired Nassau County detective?

A. Yes.

Q. And did you work with Mr. Steiner or any of the reports that Mr. Steiner brought in on Prompt Reports?

A. Did I work?

Q. Did you work on any of those matters?

A. Yes.

Q. Which ones?

A. Oh, gee, I dont remember. I couldn't even recall right now. He wanted me to try to reach somebody to—on a client to serve him with a summons. Things like that where he will be so he could be served. I really don't recall it.

Q. Do you know if Steiner had any connection at all with getting Las Vegas accounts for either Mr. Cox or Mr. Provenzano?

A. I don't know as a fact, Mr. Weiner. I'm here to tell you everything I know.

Q. Tell us what Mr. Cox or Mr. Provenzano told you about it.

A. I'm the type of person, I don't like to say anything unless I personally know it to be true. From talk I heard. This is just talk. I don't know.

Q. Just tell us who you heard it from.

A. Who I heard it from?

Q. Yes.

A. It was so long ago. I'm trying to recall. I remember Frank Provenzano telling me that somebody was down in Vegas, a former retired police officer and was supposed to bring back work for him or get him an in on the markers, one of the hotels in Vegas. I had then—I had related it later onto Mr. Frank Steiner when I was with Walter Cox.

Q. Does the name Nat Bonora mean anything to you?

A. Yes. Nat Bonora is a private investigator.

Q. How do you know him?

A. Through Walter Cox, Nat Bonora would have some cases on his own to investigate and he would need reports on it and we had done a few reports for Nat Bonora.

Q. In fact, Mr. Bonora at one time was partners with Frank Steiner, was he not?

A. If he was, I don't know. That's what I was told. If he was, I don't know it to be a fact, but I was told at one time they were partners and they broke up.

Q. Did you have a conversation with Mr. Provenzano last week or were you unable to reach him?

A. I haven't spoken to Frank Provenzano on four, five months.

Q. The last time you talked to him was your last appearance before the Grand Jury, was it not?

A. I don't remember, to be very honest with you.
Q. Do you remember what was discussed?
A. With me and Frank?
Q. Right.
A. (No response.)
Q. You don't remember?
A. Last time what I said to Frank when I spoke to Frank Provenzano?
Q. Right.
A. As a matter of fact, no. I don't remember the last conversation, if there was a conversation between me and Frank after the time I was with—before the Grand Jury. I know Frank Provenzano wanted to talk to me and I didn't want to talk to him.
Q. Was there a conversation with Mr. Provenzano after one of you was interviewed by the F.B.I. Do you recall that?
A. You mean when they were at my home?
Q. I believe there was a call made either by you or by Mr. Provenzano to you concerning the F.B.I. wanting the name of Mrs. Kramer.
A. Right. You refreshed my memory. Frank Provenzano called me telling me the F.B.I. wanted to see me.
Q. What was your response, if any?
A. I was very angry.
Q. At Provenzano?
A. Yes.
Q. What for?
A. Why would the F.B.I. want to see me?
Q. Do you think he gave them some wrong information about you?
A. Well, that's what it would appear. I can't say because I don't know, but that's what it would appear, wouldn't it? I have to be honest. That's what it appears.
Q. Does it still appear that way to you?
A. It appears that way, but I just can't see why Frank would do something like that. He has no reason to.
Q. Now, there was some crossed words, I believe when you left his employ, is that right?
A. I was supposed to get paid and I didn't get paid and I was very upset on pay day came and I didn't get paid and I went home and Frank called me and we had a few words on the telephone and he even asked me to come back to work for him, but I didn't want to.

Everybody has a few crossed words when they get angry and I understand human beings. I guess Frank does too. He said forget about it. Come on it. The pay should have been there and it wasn't.
Q. I asked you, I think, the last time if he said to you, "You threatened me, kid, and you won't walk the streets."
A. Yes. Frank said that. He said that in a fit of anger. I can't say anything derogatory that he would do that. I have to be honest with you. I'm not sticking up for Frank Provenzano, but anybody will say something when you get him mad and in anger.
Q. I believe that we discussed the last time that Provenzano instructed you to tape record some conversations, tape record your conversations?
A. Yes. He was a fanatic about that. He like things taped on the telephone.
Q. And you said you did not tape record anything?
A. Oh, I taped a few and I don't recall who it was in collections. Yes.
Q. Do you know if you tape recorded any conversations concerning the Stoneseifer account?
A. I don't remember. I don't remember who was taped. It wasn't anything of importance.
Q. What was done with the tape recordings that were actually recorded?
A. I have no idea.
Q. Did you give them to Provenzano?
A. I never took them. Frank was in the room while I was talking to the party on the telephone and taped it and had it untaped.
Q. Oh, he would do that?
A. He would do that. I think Frank liked to listen to the conversation on collection, the way the other party, what they had to say and what I had to say. I think it was just a toy with him. I'm assuming. I don't know.
Q. Did you ever see what he did with the tape recording?
A. No.
Q. Did you ever see him record while he was talking on the telephone?
A. Yes.
Q. On many occasions?
A. No.
Q. What about Mr. Cox? Did he tape record?

A. I have never seen personally myself Mr. Cox tape record any conversation on the telephone.

Q. When you worked for Prompt Reports, you didn't tape record anything, did you?

A. No.

Q. Have you ever heard any of these tape recordings either from Cox or Provenzano?

A. Yes. We would tape it back at Provenzano's office. We would tape it back and see what the discussion was and listen to the two parties. I don't recall who it was.

Q. Any gambling accounts that you listened to?

A. It was on a gambling account, right.

Q. Which one?

A. I don't recall the name. When I was with Provenzano he had only had two or three markers and I can't recall who it was.

Q. Do you know if it was the Stoneseifer account?

A. I don't remember. That's the truth.

Q. Have you ever heard of Joseph Roma?

A. Yes. I heard the name Joseph Roma.

Q. In what connection?

A. Somebody that had worked for Provenzano which is a friend of mine in the business. I know him for a few years. He told me that the F.B.I. were in the office questioning him and they questioned him if he ever used the name Roma. That was the first time I heard the name mentioned.

Q. Let me get the name of this individual.

A. Carey Efferstein.

Q. Did he say that he did use the name Roma?

A. No. He didn't say he used it. He was questioned by the two F.B.I. agents that day.

Q. We are asking about Joe Roma and I think you said that Carey Efferstein——

A. First time I heard the name mentioned was Carey told me that when the two F.B.I. agents came up to see Frank Provenzano they questioned him and I believe he said it was so long ago, if he ever heard the name Roma. If he uses the name Roma.

Q. Did he say he used the name Roma?

A. No.

Q. Did you find out later that somebody did use the name Roma?

A. No. How would I find out? I assumed myself somebody

was using the name Roma, they were investigating who used the name Roma, anyone would assume that. I didn't care who used the name Roma or what it was about.

Q. When we were chatting earlier this morning, I think you mentioned another individual you thought using the name Joe Roma——

A. No. I didn't say Roma.

Q. Okay. We'll get to that in a minute.

Do you know a man named Frank Miller?

A. It sounds familiar. I can't place it right now.

Q. Did a man by that name work for Check Adjustment Bureau?

A. Wait a minute. Miller, Miller. Isn't that Miller that worked for, I believe I do know Frank Miller. Isn't he the one that worked at one time in Colonial Commercial Corporation, later went to work for Frank Provenzano, that's his name Frank Miller.

Q. That maybe the one. What did he do for Provenzano?

A. I don't know, but I knew him casually from another company where we worked.

Q. Do you know the name Freddie Migliore?

A. No.

Q. How about a Mr. Garrett?

A. That sounds familiar, but I can't place it. Migliore, that may have been an account. One of the markers, vaguely I can't recall.

Q. How about Garrett?

A. I can't recall.

Q. How many people besides yourself were working for Check Adjustment Bureau during the time you were there?

A. During the time I was with Frank for twelve weeks, there was his secretary and office manager, Claire. There was this part-time woman, Rose and to my knowledge during the day there was nobody else. If he had people come up there in the evening, I don't know.

Q. Any other men besides himself?

A. During the day?

Q. During the time you were there.

A. During the day, no. When we started to work on the hospital accounts, he introduced me to, I can't recall his name now and Frank told me he was going to do some collections in the evenings on hospital accounts. Colbey (phonetic) and that's whether he did it or not, I don't know,

but that's what Frank told me that this guy Colbey was going to work, do some collections on some hospital accounts for him.

Q. Okay. I would just like to give you a couple of names that we have received from the Check Adjustment Bureau list of marker accounts and see if you recognize working on any of these.

Sam Bernard, do you recognize that name?

A. I worked on, I would say four at the most. Harry Stoneseifer, I'll always remember that name. There were two or three others and I, if you tell me where they came from, New Jersey, I could place it or otherwise I couldn't remember the names.

Q. Scarsdale, Sam Bernard?

A. I can't recall it.

Q. Does the name Louis Broccoli mean anything to you?

A. I can't recall it. I may have worked it, but I can't recall the name.

Q. How about Jerry Rabinowitz?

A. No.

Q. You do remember Harry Stoneseifer?

A. I never spoke to Harry Stoneseifer, but I'll always remember Harry Stoneseifer.

Q. How did you get the information on the Stoneseifer account? Did Mr. Provenzano give it to you?

A. What information?

Q. The information as to what the amount of the debt was, where to get in contact with Bill Stoneseifer and so forth?

A. Well, he gave me which I can't recall at the time, what he had. If it was a photostat of a credit application, I can't recall. So I can't be honest with you. I'd rather—I don't recall what it was. If it was an application, a photostatic copy of a credit application, a signed marker, I can't recall actually. It's so long ago.

Q. Did Provenzano discuss it with you?

A. The only thing he said to me, he got this from Dave Woods' office and he hopes to collect it and see if I can do anything on it to obtain some more work. He was trying to get his foot in the door so to speak——

Q. Did you know who at the time, who the debtor was whether it was Harry Stoneseifer or Bill Stoneseifer?

A. To me it was only Harry Stoneseifer. I never came

across in the work that I was doing that he was using another name.

Q. Did you get any information from Dave Woods at the time of the first referral of the account to you?

A. No.

Q. And later did you talk to Woods about the account?

A. I spoke to Dave Woods once and I don't remember what the conversation was. Mister, I think Provenzano told me to call him up and it was just office procedure. It wasn't anything of importance.

Q. Was it to fill Mr. Woods on the progress?

A. I think so. I'm not too sure.

Q. Did Mr. Provenzano tell you that Woods had made some effort to collect the debt?

A. No.

Q. Did Woods tell you that?

A. No. I never discussed that with Woods. If I—I had one conversation with Mr. Woods outside now in the corridor first time I met him and on the telephone I think Mr. Provenzano, I can't remember office procedure that maybe I located, I located a place of business on Harry Stoneseifer. Maybe that's what I called Woods about. Do you know what I mean? I can't remember to be honest with you. It wasn't—

Q. Was any discussion by Bill Stoneseifer when you had several conversations with him?

A. That was Harry Stoneseifer's brother?

Q. Right. That Mr. Woods had made a visit attempting to collect the debt from Bill?

A. I can't recall that to be honest with you. I do remember one thing that he said he'd been questioned before on this and he told everyone the same thing. He doesn't know where his brother is.

Q. Was there any question in your mind as to who the debtor was?

A. None whatsoever.

Q. It was Harry?

A. Harry Stoneseifer.

Q. Now, if you saw the markers that were signed from the Puerto Rican hotel——

A. It wasn't a Puerto Rican hotel.

Q. Did you see markers? Do you know what a marker is?

A. I know what a marker is.

Q. Have you seen them?
A. Yes.
Q. Did you see markers in the Stoneseifer case?
A. I can't recall, Mr. Weiner, if it was a check that was signed or a marker and I'll be honest with you. I can't recall what is was.
Q. Do you remember the name that was on that?
A. It had to be Harry Stoneseifer, otherwise I would remember if it was any other name.
Q. Could it have been William or Bill Stoneseifer?
A. No.
Q. No?
A. No. Otherwise I would remember.
Q. So you saw a credit application, you think?
A. I think it was a credit ap. It's so long ago. I don't remember what it was.
Q. Let me just get this straight for the Grand Jury to understand.
You understood that Bill was not the debtor right from the start?
A. Yes.
Q. Why did you continuously talk to Bill in terms of trying to make a collection of the debt?
A. I never asked. I never asked Harry Stoneseifer's Bill for the money, but I was asking him where I could reach Harry Stoneseifer.
Q. Would you have accepted—would Check Adjustment Bureau accept payment from Bill Stoneseifer?
A. I don't know that you would have to ask Frank Provenzano.
Q. Suppose Bill had offered to pay Harry's debt, what would you have said?
A. What I would have said?
Q. You would have accepted then?
A. Would I have accepted it?
Q. Yes.
A. I don't know why he would want to pay his brother's debt.
Q. Well, just answer the question.
A. Well, would I have accepted it? Well, I would have said send the check in. What else would I say?
Q. Did you talk to Mr. Provenzano about the fact that the debt was Harry's debt, not Bill's?

A. No. I never discussed it with him. I might have mentioned or I wrote a report on it which I know that Frank Provenzano took to Vegas to him, to other casinos to show, you know, our procedure. I never discussed his brother with him. I called his brother. His brother doesn't know where he is. He would like to know. In fact his brother was very nice. He had told me that he was working for a Cooperman in New York. He told me everything he knew about it. Actually that was Cooperman Lab and that was the boss' name. He was very cooperative.
Q. Did Provenzano tell you he had made some calls concerning the Stoneseifer account?
A. No. If he did, I wasn't aware of it.
Q. He never talked about that?
A. (No response.)
Q. The answer is "no"?
A. No.
Q. Did Provenzano ever tell you that he was going to send collectors out on the Stoneseifer account?
A. No.
Q. Or that he was going to go out himself to attempt to collect?
A. No. We never actually knew where Harry Stoneseifer was. I located a place of business, but—and an address and he didn't go back to work and he wasn't at that address.
Q. Did you ever have as your purpose in contacting Bill the collection of the debt?
A. You want to repeat that question?
Q. Did you ever have as your purpose in contacting Bill Stoneseifer the collection of the debt?
A. None whatsoever.
Q. It was always to locate Harry?
A. Definitely.
Q. How many calls did you make to Bill Stoneseifer?
A. Oh, I would say approximately maybe three or four.
Q. Only three or four?
A. That I remember trying to be honest that I remember.
Q. And it's your testimony that you knew nothing of Provenzano also working the Stoneseifer account?
A. If Frank Provenzano worked the Stoneseifer account after I left the office at 5 o'clock or on a Saturday or after I left him, I don't know.
Q. But he never worked it in conjunction with you, that

is you would make one call, he would make another? You would discuss what happened and so forth?

A. No. Frank Provenzano as you met him, I mean, as far as he wasn't what you call a collector in this business as calling up somebody and so forth on the telephone, I mean I think he would know how to approach him.

Q. What do you mean by that? How would he approach them?

A. Oh, I don't want you to misinterpret what I mean now. Mr. Weiner, I never heard Frank Provenzano on the telephone asking anybody for money.

Q. You think he would threaten them?

A. Do I personally think that? No. I personally think that, no.

Q. Now, you had some other calls with other members of the Stoneseifer family, Pamela Stoneseifer for one, is that right?

A. I don't remember who's Pamela. You have to refresh my memory.

Q. The ex-wife of Harry Stoneseifer.

A. Yes.

Q. How many conversations did you have with her?

A. I don't remember. It might have been one or two.

Q. What was the purpose of calling her?

A. Well, at the time when I located Pamela, living in Long Island, I didn't know that Harry and her were separated.

Q. Did you make any effort to collect from Pamela or to tell her that somebody owed a debt and somebody had to pay?

A. Did I make any effort to collect from Pamela, no.

Q. What was your purpose in calling her?

A. To find out where her husband, Harry was. I didn't know at the time when I called her they were separated or divorced. I don't remember what now.

Q. Did you make a call to Marie Kay Stoneseifer in Gettysburg, Pennsylvania, the mother of Harry?

A. Yes, and Bill. Yes.

Q. How many calls did you make to her?

A. A couple.

Q. What was the purpose of calling her?

A. Trying to locate her Henry Stoneseifer.

Q. Did you make any effort to collect the debt from her?

A. No.

Q. Did you make a call to any other members of the Stonesifer family?

A. If I did, I can't remember. He had a large family.

Q. Did you call a cousin in South Carolina?

A. I can't remember.

Q. Did you call another sister in York, Pennsylvania?

A. I may have, but I don't remember, Mr. Weiner.

Q. What was the purpose if you made these calls?

A. The purpose was to reach Harry Stoneseifer.

Q. I'm going to show you Grand Jury Exhibit number 14 which was marked on July 15, 1974 and ask if this document refers to the report that you said you wrote.

A. This looks familiar. I can't recall to be very honest with you. It was so long ago.

Q. Have you ever used the form like that to keep track of the contacts on a specific account?

A. A form like this, no. All I would do is just scribble on a piece of paper and attach it to the account.

Q. Have you ever seen anything like that written up before?

A. No. First time.

Q. You have never seen that particular document?

A. This, no. The first time.

Q. Let me refer to some of the entries on it. The client says Circus Circus Hotel. The applicant, Harry Stoneseifer. Wife, Pamela. Says divorced and there's a, it looks like a business address. How do you pronounce that?

A. Syosset Hospital.

Q. Technician and references Mrs. William Stoneseifer and Bill Stoneseifer, gas station owner. Amount of claim, $5,060.00. Bank reference and then on the other side, the second page, May 16, 1973, phoned gas station and the number is given.

Would Mr. Provenzano possibly have gotten——

A. I had made up a report for Frank on what was done on Harry Stoneseifer. Now, this is similar.

Q. But the second page——

A. It looks like—I mean somebody is giving a status on what was done on the account. I had given a status. If this is the identical status, I can't recall, to be honest with you.

Q. Well, again on May 16th in addition to phone gas

station, it says phoned Pamela and it says subject known as Harry Stone.

A. Right. That he was also known as Harry Stone.

Q. There's an address in Farmingdale for an address of his ex-wife, place of business. It says 75 Comely Drive in Lincoln Park, New Jersey.

A. I don't know who works there. As I said, this doesn't look like—I don't know whose place of business this is.

Q. I want to ask you about the entries for May 17th where it lists derogatory reports for various institutions.

A. This is something you put through the credit bureau. If you are a member of the credit bureau. Anybody would come back with this. Right here. Right here. If you are a number of the bureau, anybody would come back with this information.

Q. Did you do that through the credit bureau?

A. I didn't personally call the credit bureau. Anything I wanted to put through the credit bureau I would give to Rose.

Q. And page three has some interesting information.

Could you tell me if you have ever seen anything like this before? Let me just describe it. It appears to be credit coded report and various information dating from 1966 concerning—

A. This looks like a report from the credit bureau on Harry Stoneseifer. Judgments from various businesses.

Q. Have you ever seen that before?

A. I can't recall to be honest with you. I knew all along that he owed banks and finance companies.

Q. The fourth page appears to be a continuation of the credit report.

A. Right, if I had it at the time, I don't recall.

Q. And the last page of Grand Jury Exhibit number 14 has some other information, a report from Westchester Square Hospital giving the description of the subject, age, weight, so forth.

A. Yes. I think I might have gotten this from the hospital. Yes. This looks—I may have gotten this information for Frank at the time. They described what he looked like and so forth. From a hospital that he worked there.

Q. It says claim subject returned to Pennsylvania, return town of mother.

A. Right. I remember calling the hospital. They said he

worked there and I spoke to somebody in the bookkeeping department that he left suddenly, that he had a nice apartment in the neighborhood that he just furnished. Woman was being very friendly and giving me all this information and all of a sudden somebody was after him and he left in my course of trying to locate Harry Stoneseifer.

Q. Now, the entry for May 21st says security check made on ex-wife telephone.

A. Yes.

Q. Is Check Adjustment Bureau and the method you use able to get toll records?

A. You know as well as I do that's illegal, Mr. Weiner.

Q. It says here toll calls made from Farmingdale which is Pamela Stoneseifer's number obtained number of area code 717-334-3656 listed to Mary Kay Stoneseifer, Gettysburg, Pennsylvania.

A. Yes.

Q. Is this an illegal transaction?

A. Mr. Weiner, you know it as well as I do that you cannot obtain that from the telephone company, any agency or anybody.

Q. How was it obtained here?

A. How was it obtained there?

Q. Right.

A. I can't answer that, Mr. Weiner.

Q. Did you obtain it?

A. I don't remember, Mr. Weiner.

Q. Did Provenzano to your knowledge have any method of getting information from telephone companies through telephone company personnel about toll records?

A. No.

Q. He did not?

A. Not to my knowledge.

Q. Did you or do you?

A. Do I have any personal way of getting somebody's phone number?

Q. Right. I'm talking about telephone toll records from people.

A. You want to repeat the question? What is it exactly you want to know, Mr. Weiner?

Q. Do you have any contact with telephone——

A. Do I have personal contact, no.

Q. Do you have any way that you have in the past gotten

telephone number information in some means or another?

A. Have I ever done that in the past?

Q. Yes.

A. I can't answer that question, Mr. Weiner.

Q. Why not? Are you asserting your Fifth Amendment privilege?

A. That's correct.

Q. Now, did you obtain the telephone number of Mary Kay Stoneseifer in Gettysburg, Pennsylvania on the Stoneseifer account?

A. I believe I did to be honest with you.

Q. How did you do it?

A. I can't remember, Mr. Weiner. I won't answer that. I won't answer that question.

Q. And the reason you won't answer, are you asserting your Fifth Amendment privilege against self-incrimination?

A. That's correct.

Q. Now, the report also indicates that——

A. Am I on trial here, Mr. Weiner?

THE FOREMAN: No, ma'am, you are just to answer the questions put to you by the attorney.

Q. There's an entry on May 21st which indicates the subject mother was phoned. Mother conversation went as follows:

Harry just left home for New York. Expect him back on Friday, 5/25/73. Said son is not working. Just applied for job in Pittsburgh which he hopes to get. Does not know where he's staying in New York.

A. That sounds familiar.

Q. Did you record such information?

A. It sounds familiar.

Q. Now, entries on May 22, 1973 if you will read along with me. It indicates that several banks in Queens, Brooklyn areas were checked. Did you check those banks?

A. I may have. It's so long ago, Mr. Weiner.

Q. And an address in Glen Oaks, New York.

A. Yes, I may have.

Q. You got that information?

A. Yes.

Q. Phoned P.O.B.

A. Place of business.

Q. To verify employment of subject. Says Mr. Cooper

owner of lab verified subject does work at lab, but presently on vacation.

A. Right.

Q. Did you obtain that information?

A. Yes, I did.

Q. And you recorded it somewhere at Check Adjustment Bureau, in some sort of form or——

A. On a piece of paper, right. During my credit investigating on Harry Stoneseifer, right.

Q. And then later on May 23rd it says it is confirmed that subject is living with mother.

A. No. It is not confirmed.

Q. That's what it says.

A. Well, I don't care what it says. I never confirmed that the subject was living with the mother. The only thing I confirmed with Mr. Provenzano that the subject would visit his mother on weekends at times. That the mother confirmed with me not living with his mother.

Q. You would not have entered——

A. No, because I never confirmed that. Visiting his mother.

Q. Now, I would like to ask you a few questions about your work at Prompt Reports and Walter Cox.

When did the you meet Mr. Cox?

A. Several years ago.

Q. Was he the owner of Prompt Reports at that time?

A. No. Mr. Cox and I worked for a company called Coburn Credit Corporation. I don't know. It goes back four, five years ago. That's how I met Walter Cox.

Q. When did you start working for Prompt Reports?

A. Back in December.

Q. December, '73?

A. Yes.

Q. How long did you work there?

A. Off and on until the end of the year. I would leave and go back part time and so forth. He was establishing a business.

Q. I think the last time you said you worked off and on for about six months with him, in that correct?

A. I don't recall. I can't recall right now.

Q. In fact, when you appeared on June 10th before this Grand Jury I think you had said that you just stopped work that previous week for him?

A. I don't recall. I would stop and I would go back and so forth, but I definitely do not work for Walter Cox or do I have any intentions of going back to work for Walter Cox.

Q. During the time you worked for him, did he use any other names on his accounts?

A. Williams.

Q. Walter Williams?

A. Walter Williams.

Q. Any other names besides Williams?

A. Not to my knowledge.

Q. Do you know how Cox got into the gambling debt business?

A. How he got the markers?

Q. Yes.

A. I recall very briefly, very briefly in conversation that Mr. Cox was telling me that he went to Vegas with Frank Steiner. It was through an introduction of Frank Steiner and he got it on his own, but this was very briefly, whether that's how he got it, I don't know, but that's a brief conversation I remember Mr. Cox telling me.

Q. When you went to work for Mr. Cox in December, did he already have some of these gambling accounts?

A. Yes.

Q. Did you work on them right away?

A. Yes.

Q. Did you work on any other matters?

A. Yes. I told you I know Natty Bonora, that he did credit reports aside from that. I had done a few credit reports for Natty Bonora.

Q. How many other people during the time you worked for Prompt Reports were working there besides Mr. Cox and yourself?

A. Well, you want to phrase that another way? Do you mean that came in, that was checked with the company in some manner?

Q. Employees?

A. Employees I don't know at this particular point who was an employee and who wasn't.

Q. Do you know a Tony Domingo? Does that ring a bell?

A. Tony Domingo also known as Dennis Weinheim was one of the working there. He used the name Tony Domingo.

Q. How do you spell his last name Weinheim?

A. I believe it's W-E-I-N-H-E-I-M. I'm not too sure.

Q. Was he doing essentially the same thing you were?

A. That's correct.

Q. Do you know of your own knowledge if he made any visits to various people in order to—

A. I told you outside before I came in to my knowledge he only made one call to somebody on a marker.

Q. Do you remember who that person was?

A. I don't recall the name, but I knew he owned a massage parlor in New York.

Q. Was it Sam Bernard? Professional Weight Control Center, 455 Central Park Avenue, Scarsdale, New York?

A. I don't know. That could have been. I don't know. I can't remember. All I know that it struck the office pretty funny that here a man that owned a few massage parlors and Dennis went down with this other fellow to see him on it.

Q. Who was the other fellow that went down with him?

A. Frank Rabito, I believe.

Q. Did he work for Mr. Cox at the time you did, Rabito?

A. Dennis and Frank were only with Mr. Cox for a short time. They came. I don't know when they came. When they left a few months, a couple of months. I don't remember the months, Mr. Weiner.

Q. Did Dennis tell you why he used the name Tony Domingo?

A. No. He didn't tell me why he used it, but I'm going to assume he used the name. This is Tony Domingo calling that it sounds more impressive than Dennis Weinheim calling.

Q. What do you mean by it sounds more impressive, that name sounds more impressive?

A. Well, I think so. That's my interpretation. He never told me, but I'm telling you my own personal interpretation.

Q. More impressive in terms of it being an Italian name, is that what you are driving at?

A. Yes. I would say so. It sounds more impressive than this is Dennis Weinheim.

Q. Do you know at the time you were employed there where Mr. Cox employed any Negro people?

A. Yes.

Q. Who might that be?

A. Well, he wasn't an employee. As I said, there were a few people there. I wouldn't consider him an employee. There was this young man, Branch, Henry Branch.

Q. What did he do?

A. What did Henry do? His exact duties to be very truthful with you, I don't know. Henry would come in and sit in the office and read a paper.

Q. Did he make any phone calls for collections?

A. No.

Q. Did he go out on any collections to your knowledge?

A. Yes. Henry went down to collect. I asked him, he gave it to Walter once. He collected some money on one account for me.

Q. Was that a gambling account?

A. Right. The poor woman was sick and Henry went down and picked up the money, right on a couple of accounts.

Q. Did he go alone? Did Henry go alone?

A. Yes. This is an appointment where it was confirmed appointment where he said I have the money. Come on down and pick it up. Like sending a messenger. That's what more or less Henry was to pick it up. That was it.

Q. Does the name Joney Atkins mean anything to you?

A. Yes.

Q. Could you tell us in what connection?

A. Walter Cox held, I don't know markers on him on one of the hotels. Right now I don't know which hotel it was.

Q. Do you remember talking to Mr. Atkins?

A. I spoke to Mr. Atkins several times.

Q. He lived in Sarasota, Florida, is that correct?

A. Yes. That's correct.

Q. Do you remember what the conversations were with Mr. Atkins and when they took place?

A. Briefly the conversation was this. I remember a letter when I first saw the file that Mr. Atkins had sent to Walter Cox also known as Walter Williams saying that he acknowledges the debt, not in those words, but something like that and when things—a situation will change he will pay.

Q. Do you know if Mr. Cox also made calls to Joney Atkins?

A. Yes. Mr. Cox, I know has spoken to Joney Atkins.

Q. Why did both of you work that same account?

A. Why not?

Q. Well, weren't you kind of double-teaming him?

A. I don't know what you mean.

Q. Why couldn't just one of you work the Atkins account instead of both of you making periodic calls? I don't understand the technique.

A. Well, there's no such technique in that business, Mr. Weiner.

Q. There isn't?

A. There isn't.

Q. Did you threaten Mr. Atkins?

A. I never threatened anyone in my life, Mr. Weiner. I have no need to or reason to.

Q. Do you know if Mr. Cox tape recorded any conversations with Mr. Atkins or did you?

A. I never did. Whether Mr. Cox did, I don't know.

Q. He never played anything back for you, did he?

A. I can't recall.

Q. I think a few minutes ago you said that sometimes Provenzano would play back and you would listen to some tapes?

A. Yes.

Q. Did Cox do the same?

A. To be very honest with you, you have me bedaffled here, I don't recall.

Q. Just take your time.

A. I don't recall. I know Cox never had—Mr. Cox never had a tape recorder machine in his office. Whether he brought one in toward the very end, I think he did, I can't recall. It was unimportant to me. It was no issue that I would make a point of remembering that was his business.

Q. Do you know if Cox used a speaker?

A. Yes, he did. He liked using a speaker.

Q. He would have his hands free?

A. Right.

Q. Did you ever use a speaker?

A. No.

Q. Were you ever asked to get that physical setup up promptly, was your desk located near his?

A. It was two different offices. He would have the door open. He could look directly at me if he had his door open from his office. Yes, not in the same office.

Q. There was no opportunity out there was with you and Mr. Provenzano to overhear Cox's conversation?

A. Not if he had the door closed. If he had the door opened, 99 per cent of the time I never listened to him.

Q. Do you know what happened to Joney Atkins debt?

A. I don't believe it was collected by Mr. Cox. I can't recall. I don't believe it was collected. No.

Q. Does the name Maurice Grey mean anything to you?

A. Yes.

Q. In what connection?

A. I can't remember the hotel, but we had markers on Mr. Grey.

Q. Do you know if he okayed a marker for another named individual named Harold Mequintuck (phonetic). Does that——

A. That rings a bell, whether it is so or not, I don't remember. It could be. It sounds familiar, but I can't pin it down.

Q. How many calls did you make to Mr. Grey?

A. Several.

Q. And did Mr. Cox also make calls to Mr. Grey?

A. Yes.

Q. Did you both work that account, too?

A. Yes.

Q. Do you rememer what the outcome of the Grey account was?

A. Yes. I remember the outcome of the Grey account. He was very nasty on the telephone and Mr. Cox spoke to him.

Q. What do you mean by nasty?

A. Nasty.

Q. What did he say?

A. I can't remember in words, but he was very nasty on the telephone when you would call him. Like he said I can't recall whether he had signed a marker for someone else. We had called him because it was his signiature on the marker.

Q. Did he ever threaten you or Mr. Cox? Did Mr. Grey ever threaten you or Mr. Cox?

A. I was threatened numerous times when I made some phone calls. I can't remember who did the threatening on what particular name it is right now. It's unimportant, but I was threatened numerous times when I would just call up and say we represent International. We represent the Desert Inn. I'm calling from so and so's office. That's how the conversation went. We have your markers here.

We would like to—it's been a couple of years. Don't you think, you know, talk to them nicely.

Q. What would they say in terms of making threats on you?

A. A few of them that I would call were so well connected which I had never come across people well connected before up until that time that in other words, threaten me where do I have the audacity, to call them up and asking them for money.

Q. Did they threaten you with physical violence?

A. Yes.

Q. Did any of them say they were going to call the F.B.I. or the police? I guess that's a different kind of threat.

A. Yes. I guess that would be a different type of threat where some did say that they called the F.B.I. and they did come back. I think I said that's a good idea. Call the F.B.I.

Q. Getting back to Maurice Grey, was there ever a time that—I think you would make a call and then turn that line over to Mr. Cox?

A. Well, Mr. Cox numerous times would ask me. He didn't, you know, he used the speaker, I guess he didn't like dialing on the telephone, for what reason, I don't know. Numerous times he would ask me to get somebody on the telephone and I would get him and Mr. Cox would talk to them numerous times.

Q. It wouldn't be a three-way conversation, would it?

A. No.

Q. Did Mr. Cox ever discuss the fact with you that he told Grey that he was going to break his head if he didn't pay? Did Mr. Cox ever discuss or did you ever overhear anything like that ever?

A. I remember vaguely Mr. Cox shouting at Mr. Grey or he was shouting back and forth because he was threatening him and so forth, but I don't remember Mr. Cox and I don't have to stick up for Mr. Walter Cox. He doesn't mean anything to me. He just got me this individual problem because I'm sitting here in front of you now. I never heard him threaten anybody on the telephone. I heard him get mad on the telephone, use some abusive language because it was used at the other end, too. That what's true is true and he would come back with the same thing. But I never heard

him threaten anybody bodily. I wouldn't stay there if he did.

Q. When you say abusive language——

A. And I don't have to say this about it. But it's true.

Q. You have to tell the truth.

A. I'm telling you the truth. He would get mad, say a few words and so forth, but never threaten anybody bodily.

Q. When you say——

A. If he did, I wasn't in the office. I didn't hear it.

Q. When you say he came back with the same, are you talking about using obscene language or loud language?

A. Right.

Q. Did you ever come——

A. Calling each other names and so forth.

Q. Did you likewise come back with the same to some people?

A. No. I was never at any time where I used that type of language personally. Myself on the telephone. They would say that to me at the other end but never came back that way.

Q. Okay. I would like to ask you about a woman named Marilyn Shi Shi Haieh.

Did you ever work on an account of Marilyn Shi Shi's?

A. Yes, I did.

Q. Could you give us the details?

A. Marilyn Shi Shi, an account from us from Tom Boyce's office who is the credit manager from the Desert Inn in Las Vegas. She owed $25,500.00. She lived in New York and in a penthouse apartment. I had spoken to Madam Shi Shi several times. She acknowledged the debt. She will pay when she's ready to pay. A few times she said she was going to come down and see Mr. Williams, make an appointment. A few times she said she will pay Barbara Boyce, but she never kept her word on anything she said.

Q. Barbara Boyce is from the Desert Inn, right?

A. That's right.

Q. How many calls did you make to Mrs. Shi Shi?

A. Several.

Q. Did anybody ever visit her at her penthouse apartment?

A. Not to my knowledge.

Q. Did you ever say you were from the Internal Revenue Service?

A. No.

Q. Did you ever say you were from a lawyer's office or any other pretext?

A. No.

Q. Do you know if Mr. Cox using Mr. Williams' name made any calls to Mrs. Shi Shi?

A. He had spoken to Mrs. Shi Shi, Madam Shi Shi, yes. What the conversation was, she was supposed to come down. There was an appointment for her to come down to the office once and she never showed up and she made another appointment and she never showed up.

Q. Do you know the results finally of her account?

A. No.

Q. Did you know what kind of business she was in?

A. I never knew she was in business. My interpretation of her, she was just a very well to do woman. Where she got her money from, I don't know.

Q. Did you ever contact any of her relatives?

A. No.

Q. Sons or daughters?

A. I have spoken to the daughter once or it was a son. I couldn't tell. It was a young child. Sometimes they sound a male and female sound alike when they are young. I don't know whether it was a son or daughter.

Q. Did you ever talk to an answering service at her apartment?

A. Several times, right.

Q. Doorman?

A. Yes.

Q. Would they answer the phone, the doorman?

A. Oh, no. In other words, I called the doorman to find out Madam Shi Shi before I found out whether she lived there or whether she does live there or whether she's in Europe or so forth.

Q. Why did both you and Mr. Cox work that account as well?

A. If you don't mind me saying that's a very foolish question, Mr. Weiner. I wasn't solely working the account. Mr. Cox worked them or someone else would pick them up.

Q. Did you ever threaten Mrs. Shi Shi?

A. I told you I never threatened anybody in my life, Mr. Weiner.

Q. Did you ever say that people in her position who don't cooperate would be known to lose an arm or a leg?

A. Mr. Weiner, I have never said that. Now, I would like to ask you something. Where did you get a statement like that?

Q. Well, I'm asking the questions, Mrs. Jacobs.

A. I have never said anything like that at any time.

Q. Have you ever heard the name Semel?

A. It sounds familiar.

Q. Frank A. Timpa?

A. Timpa, Timpa. Wasn't that a Provenzano account? I'm not too sure.

Q. Did you work it?

A. I may have. It sounds familiar.

Q. Can I ask you on these accounts that you worked for Mr. Cox specifically, were you on salary with him or would you get an extra bonus or some type of commission if you were successful on collections?

A. I did not get any bonus if I was successful on collections, whether Mr. Cox would collect a $10,000.00 marker, I would not see a penny of it.

Q. How much were you paid by Mr. Cox? I know it's complicated because of the part time arrangements.

A. Right. It was complicated because of the part time arrangements. It was basically, I would draw roughly about $200.00. I did not receive any monies on any monies that came in on accounts that were collected on markers.

Q. How about other accounts?

A. Nothing.

Q. Does the name Albert M. Tomarkin mean anything?

A. You want to repeat that?

Q. Albert Tomarkin.

A. Yes.

Q. Who was he?

A. An account from I believe Caesar's Palace. I'm not too sure. Collected money from that account.

Q. Do you remember calling a girlfriend of his in Miami, Florida named Lee Eberhard (phonetic), a stewardess?

A. Do I remember calling?

Q. Yes.

A. No, I can't remember.

Q. Do you remember talking to Mr. Tomarkin yourself?

A. I spoke several times to Mr. Tomarkin. Not asking him

for the money. Mr. Williams spoke to Mr. Tomarkin as far as collecting it. Do you know what I mean?

Q. Did you speak to his mother in Spring Valley?

A. I never knew he had a mother.

Q. Everybody has a mother.

A. Living.

Q. You never spoke to Mr. Tomarkin's mother in Spring Valley?

A. No.

MR. WEINER: Any questions?

(No response.)

MR. WEINER: Mrs. Jacobs, at this time I would like you to return next Monday. Be here at 10 o'clock. You can come to room 327A in the same place that you came.

THE WITNESS: You mean there are some more questions you want to ask me?

MR. WEINER: Yes.

THE FOREMAN: Mrs. Jacobs, you are still under subpoena of the Grand Jury. You are to report back here next Monday morning which would be November 11th, at 10 o'clock in the morning to room 327A.

You are excused at this time.

(Whereupon, the witness was excused and withdrew.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

ESTELLE JACOBS
a/k/a "MRS. KRAMER"
DEFENDANT.

INDICTMENT
18 U.S.C. § 875(c)
18 U.S.C. § 1623

THE GRAND JURY CHARGES:

COUNT ONE

1. At all times material to this Indictment:

a. V.I.P. Plus was a New York corporation primarily engaged in the business of organizing gambling junkets with offices at 551 Fifth Avenue, New York, New York.

b. Check Adjustment Bureau was a New York corporation engaged in the debt collection business with offices at 2949 Long Beach Road, Oceanside, New York.

c. Defendant ESTELLE JACOBS a/k/a "MRS. KRAMER" was employed as a collector for Check Adjustment Bureau, Oceanside, New York from April 2, 1973, to June 20, 1973.

d. Harry W. Stonesifer, Jr. used the name of his brother, William D. Stonesifer, on a gambling junket to Puerto Rico during March 1973 in which he incurred a debt of $5,060; the junket was organized by V.I.P. Plus.

e. William D. Stonesifer was the owner of Lincoln Park Shell Station located at 275 Comley Road, Lincoln Park, New Jersey.

2. On or about May 22, 1973, in the Eastern District of New York, defendant ESTELLE JACOBS a/k/a "MRS. KRAMER" did unlawfully, willfully, and knowingly transmit in interstate commerce from Oceanside, New York to Lincoln Park, New Jersey a telephone communication to William D. Stonesifer, which telephone communication contained a threat to injure the person of Harry W. Stonesifer, Jr.

[In violation of Title 18, United States Code, Section 875 (c)]

COUNT TWO

1. On or about June 10, 1974, in the Eastern District of New York, defendant ESTELLE JACOBS a/k/a "MRS. KRAMER," having duly taken an oath that she would testify truthfuly before a Grand Jury of the United States of America, duly empanelled and sworn in the United States District Court for the Eastern District of New York, and inquiring for that District into violations of Federal law, did unlawfully, willfully, and knowingly make false material declarations as hereinafter set forth.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation into possible violations of Title 18, United States Code, Section 894 (extortionate credit transactions), Title 18, United States Code, Section 1962 (racketeer influenced and corrupt organizations), and other Federal criminal statutes.

3. It was material to the investigation described in paragraph 2 hereof that the Grand Jury ascertain whether defendant ESTELLE JACOBS threatened Harry W. Stonesifer, Jr. and others with the use of violence and other criminal means to collect extensions of credit.

4. At the time and place aforesaid, defendant ESTELLE JACOBS, appearing as a witness under oath before the Grand Jury, did testify falsely with respect to the aforesaid material matter as follows:

Q. I'm going to read some direct quotes to you, Mrs. Jacobs, and I want to know whether or not you said them?

> "MRS. KRAMER: Well, you know what's going to happen to him one of these days.
> BILL: Well, he's going to die anyhow that's besides the point.
> MRS. KRAMER: Sooner than he expects.
> BILL: No, I don't.
> MRS. KRAMER: Sooner than he expects. Maybe it's going to be painful to be honest with you."

A. I never said that.
Q. Are you absolutely positive that you never said that.
A. Absolutely positive.

• • •

Q. You never said to anyone these words, "Maybe it's going to be painful, to be honest with you."

A. I never said it. I know I'm under oath.

• • •

"BILL: Well, you know it's got nothing to do with me. MRS. KRAMER: I mean it's really a shame, but he's gonna get his pretty soon, just a matter of hours to be honest with you and as I told you, I'm being honest with you. We didn't like going into mother, but we will. BILL: Well, you know."

• • •

Q. Did you say, "But he's going to get his pretty soon?"
A. I did not.
Q. You absolutely deny that statement?
A. Yes. I deny it.

5. The aforesaid testimony of defendant ESTELLE JACOBS a/k/a "MRS. KRAMER," as she then and there well knew, was false.

[In violation of Title 18, United States Code, Section 1623]

A TRUE BILL,

FOREMAN

David G. Trager
DAVID G. TRAGER
United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—against— 74-CR-703

ESTELLE JACOBS,

DEFENDANT.

United States Courthouse
Brooklyn, New York
June 6, 1975
10:15 o'clock A.M.

Before:

HONORABLE EDWARD R. NEAHER, U.S.D.J.

JOSEPH BARBELLA
Official Court Reporter

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD C. WEINER, ESQ.
Department of Justice
Box 571 Ben Franklin Station
Washington, D.C. 20044

I. P. SEIDMAN, ESQ.
Attorney for Defendant

THE CLERK: Criminal motion, United States versus Estelle Jacobs.

MR. WEINER: Edward Weiner, for the United States. We are ready.

MR. SEIDMAN: I. P. Seidman for Estelle Jacobs.

MR. WEINER: Your Honor, we are here on argument for pretrial motions which have been filed by Mr. Seidman. Both sides have filed responses.

THE COURT: I have read the papers. It is your motion, Mr. Seidman.

MR. SEIDMAN: Yes, it is. May I be heard?

THE COURT: Do you want to be heard on it?

MR. SEIDMAN: Thank you, sir.

If your Honor please, I'd like to address the Court, not in the order and sequence that the motion is enumerated with respect to its various points. Initially, I would like to address myself to the aspect of calling a fugitive defendant before a Grand Jury whereby the United States Government in presenting this matter to the Grand Jury apparently had in its possession prior to Mrs. Kramer—Mrs. Jacobs' appearing before the Grand Jury a purported tape recording of—purported tape recording of a conversation in which it is contended that Mrs. Jacobs had threatened an individual contrary to and violative of federal law.

There is a present case pending before the United States Supreme Court entitled United States v. Manning Guana, in which cert has been granted, where the lower court dismissed the indictment alleging that the witness's constitutional rights were violated in view of the fact that the U.S. Attorney knew at the time that the witness was to be a defendant in the matter.

With respect to Mrs. Jacobs, I believe we are dealing with an identification. We are not dealing merely with a witness. And I place that in quotes. We are dealing here with what appears to be from the record clearly a putative defendant, one who is intended to be indicted by the United States Grand Jury on the presentation of prior or subsequent evidence to that body.

I might add that there are other features and facts surrounding this aspect of the case, in that Mrs. Jacobs' background, which basically is that of a housewife, an unsophisticated individual appeared before the Grand Jury without an attorney.

Now, of course, the prosecutor will indicate that he may have advised her of quote her Miranda rights. I question whether or not his warning to her was sufficient. And I believe that there was a duty upon the prosecutor in this instance to inform Mrs. Jacobs that there was a tape recording which he was in possession of that had been or would be presented to the Grand Jury; that this tape recording indicated that she had violated the federal laws; and that in

all likelihood she would be a defendant indicated by an Eastern District Grand Jury.

If a reading of the Grand Jury testimony by myself is understood, at no time did Mr. Weiner inform Mrs. Jacobs that he was in possession of a tape recording which indicated that she had made certain statements to an individual at a time well prior to her appearance before that Grand Jury, and the questions propounded to her, and the sought-for recollections that were requested as a response from her in no way indicated the existence of a wiretap.

The name of the party, as I understand the transcript, to whom she is alleged to have made this specific statement, assuming that it was a true and accurate recounting of the exact articulation attributed to Mrs. Jacobs in that matter —I believe that the Court in this instance has to put certain restraints upon the prosecutor who calls an individual before a Grand Jury, knowing that that individual is intended to be indicted without informing her or him that that is their posture.

We are not dealing here simply with the witness who is not a prospective defendant, who is called before a Grand Jury and has willfully lied, where there has been an exact informational statement made to that party when he or she appears before the Grand Jury.

There is no doubt in my mind, predicated upon my own experience, that at the time that Mr. Weiner called Mrs. Jacobs before the Grand Jury that administratively the Department of Justice had determined in their minds that the tape recording in question indicated that Mrs. Jacobs had violated the particular sections of the federal criminal law that are the predicate of count one of this indictment.

THE COURT: Well——

MR. SEIDMAN: Therefore, I believe that her Fifth and Sixth Amendment rights have been violated, to wit, that it was an entrapment seeking to have her waive her privilege against self-incrimination; that her right to counsel under the Sixth Amendment was violated, and certainly certain legal rights which would have been inherent to her, to wit, whether or not she could have even questioned or sought to attack her appearance before the Grand Jury on the grounds that the predicate for her being questioned before the Grand Jury was that of illegally obtained evidence.

And I respectfully call the Court's attention to the rea-

soning contained in United States v. Manning

THE COURT: I have that noted. It's all right, counsel, I have that noted.

Your claim is that with respect to—that argument is really directed to count two.

MR. SEIDMAN: That is correct.

THE COURT: The perjury count.

MR. SEIDMAN: That's correct.

THE COURT: That is to say, you are suggesting, already knowing that she had made certain statements, that according to the tape the Government was in possession of sufficient information to know that she had already committed what the Government would consider a crime.

MR. SEIDMAN: That is correct.

THE COURT: And in all likelihood would be a target of any Grand Jury action on that account?

MR. SEIDMAN: That's correct.

THE COURT: And that, therefore, the Government was under a duty to call her attention to that before she was called before the Grand Jury.

MR. SEIDMAN: That is correct.

THE COURT: And give her the opportunity to consult with counsel as to whether or not she would really appear before the Grand Jury at all under those circumstances.

MR. SEIDMAN: That is correct, your Honor.

And we are dealing here—and I believe the record would show that Mrs. Jacobs is a housewife, who worked part time or full time at times to augment her family income. And this is not a situation, I believe the record would show, where we are dealing with someone who is involved in a sophisticated scheme to defraud or someone connected with organized crime. And there is no question that the record will establish that using the language of the courts, that Mrs. Jacobs was a putative defendant. She wasn't merely a witness. And openness and frankness would have dictated a complete disclosure by the Government to Mrs. Jacobs of the existence of the tape recording of the exact colloquy that is alleged to be attributed to her. And a frankness and openness which would have left her at best conceivably with count one of the indictment.

But at the same time, not faced with a perjury indictment, which if represented by counsel may have led to a motion being brought in this very courthouse attacking the

source of count one of the indictment and attacking—as to its legality and as to whether——

THE COURT: On what grounds——

MR. SEIDMAN: If your Honor please, I believe under the statutory grounds that any witness called before a Federal Grand Jury can move to (a) prohibit being questioned before that Grand Jury on the grounds that the source of the questioning, to wit, the tape in question, was illegal evidence. And the Federal Statute clearly states that a witness called before a Grand Jury has standing to attack the source of the questioning if such source is illegal and constitutes evidence not properly before either the Grand Jury or a court.

I believe Kastegard stands for that proposition. And there a whole line of cases arising out of the—whether these cases have sustained the right of a witness to attack the source of the information before the Grand Jury, which is the predicate of the questioning, if that evidence constitutes the fruits of illegal conduct by the Government.

Of course, the burden, then would have been for Mrs. Jacobs to establish that such were the facts. But the issue here is whether or not she was denuded of all statutory and constitutional rights in the manner from the standpoint of the witness standing as a prospective defendant clearly, and two, the tape recording being in existence in the presence—the physical presence of the prosecutor, and should not the prosecutor in this instance have said to Mrs. Jacobs, "Mrs. Jacobs, we have a tape recording of a conversation you had with Mr. Stone. And this is the transcript."

Or "We will play it to you. Do you wish to deny it or explain?"

That was the purpose for calling her to the Grand Jury.

And there was no disclosure, as I understand the record as it is available to me, to the witness in this case that (a) she was a prospective defendant and (b) that to refresh her recollection, to avoid the possibility of perjury in this case due to the lack of recall, that there was a tape recording that could be made available to her if it wasn't important to the prosecutor to call her before the Grand Jury and acknowledge the conversation which apparently is in count one of the indictment.

I wish to state to the Court that I am not condoning perjury. But there was truly not a full and complete dis-

closure as required by the Constitution in this case to apprise the prospective defendant of what was at play from the standpoint of the facts available either to the Grand Jury or the prosecutor.

THE COURT: In other words, you are saying that the warnings were given to her; that she had a right under the Fifth Amendment to avail herself of the privilege against self-incrimination; and the Sixth Amendment, the right to have any counsel of her choice present before she gave her testimony.

You don't think that is sufficient?

MR. SEIDMAN: In this situation, using the reasoning of the Manning Guana case, your Honor, I believe that is constitutionally insufficient in that there was not a true, voluntary waiver of this witness, this prospective defendant, this putative defendant's Fifth and Sixth Amendment rights.

And I respectfully submit that under the Manning Guana case—and I believe that the facts in this case conceivably are even more strenuous in supporting that reasoning. But I want to reiterate to the Court that I am not suggesting to the Court that my argument here is that any putative defendant may commit perjury.

THE COURT: Well, I understand that. I think you have to agree that no one has the right to testify falsely before a Grand Jury. That is to say, one who does inevitably faces the consequences if it is done with the requisite knowledge and intent.

MR. SEIDMAN: I believe that to support my argument as to whether or not this was a willful or intentional perjury —if it is a perjury—that there is no proof before this Grand Jury that at the time that Mrs. Jacobs appeared, that she did in truth and in fact recall this conversation. And the fact that the prosecutor failed to play the very conversation to her, although he seemed to relate a conversation in a way to have clearly refreshed the witness's recollection—if he were seeking to determine whether or not this was or was not her statement or speaking voice in this it would have been said to her, "We will now play you this recording."

THE COURT: In other words, what was read was the transcript of what she was alleged to have said?

MR. SEIDMAN: Without indicating to the witness, I believe, that this was a transcript. It was in the colloquy of a question saying, "Did you ever say to Mr. —"

THE COURT: Yes. I'm looking at it.

MR. SEIDMAN: (Cont'g) "—the following."

And if it was not intended as a means of entrapment and if someone were seeking to determine whether Mrs. Jacobs intended to willfully lie to a Grand Jury, then the way to have confronted her would have been to have placed in the Grand Jury Room a machine that would have played to her the conversation. And if she intended to testify falsely in this case—and from my experience I have seen people do this—that they will state that that is not my voice; that is someone else speaking.

But this was clearly not done in this case.

And I believe that due process and fair play would have required the prosecutor in this instance—and given the posture of this situation—to mechanically play to the witness the conversation. And if at that time she denied that that was her voice—and he, I assume, could have then have placed experts or lay people before the Grand Jury to recognize her voice and say, "I have spoken to Mrs. Jacobs on many occasions and I identify the voice in that conversation to be the voice of Mrs. Jacobs."

If your Honor please, I would now like—I would wish to address myself to the issue of the source of the questioning, to wit, this tape recording.

Mr. Weiner has been most courteous and cooperative, but I do not believe that at the moment I have sufficient facts to determine how this particular tape recording came about. It would appear as though there was a tape recording made of an outgoing call made by Mr. Stonesifer in this matter. Whether or not the source of the machine or the suggestion as to how this particular tape recording would be made was Mr. Stonesifer himself or governmental authority, to wit, the police, remains to me unclear. Although it is clear that in the law, although I may contest it —I am not agreeing with it—that one party to have a conversation may record that conversation. I believe that once law enforcement becomes involved in a situation prior to that conversation being recorded, even though the particular party then consents with law enforcement that he will record the conversation, that he is a party to, that in that

instance I believe the failure of the Government to obtain a court order to record the conversation is violative of my client's statutory and constitutional rights.

THE COURT: Do you have any authority on that? I don't think I saw any in your belief.

MR. SEIDMAN: Well, I found it difficult to get a case in point. I am still looking for it. If you permit me until about this weekend, I am going to see.

THE COURT: Mr. Weiner?

MR. WEINER: There are none.

THE COURT: Mr. Weiner says there are none.

MR. WEINER: United States vs. White, 401 U.S. 616.

THE COURT: What?

MR. WEINER: United States vs. White, 401 U.S. 616, which holds contrary to Mr. Seidman's position, your Honor. No court order is required. The White case which was decided in 1971—and I have asked Mr. Seidman for his authority on this since three weeks ago and he hasn't come up with it.

MR. SEIDMAN: That is what law is made about.

THE COURT: I think you had better turn to some other point.

MR. SEIDMAN: Your Honor, at the same time, I submit for the purpose of the record, that Mr. Stonesifer, if he did record the conversation that is the predicate of count one of the indictment, that he was an agent of Government. And, therefore, acting on behalf of Government and as an agent of Government, he was required to obtain a court-approved order to record the conversation.

THE COURT: That's a good try.

MR. SEIDMAN: That's all we can do, your Honor.

More importantly, your Honor, the prosecutor was courteous enough to provide me with a copy of the wire recording.

THE COURT: Which, I take it, was not done pursuant to court order.

MR. SEIDMAN: Which was not done pursuant to court order.

I would respectfully request an evidentiary hearing to determine the physical circumstances under which this recording, which is the predicate of the indictment, was made and whether or not the recording consists of all of the conversation.

THE COURT: Well, let me ask you this. Are you suggesting what is tantamount to a suppression hearing?

MR. SEIDMAN: That is correct. On the ground that the recording that I have in my possession may not be the full and complete conversation that transpired between Mrs. Jacobs and—may not be the full and complete conversation that transpired during this period of time, and that, therefore, the conversation which is the predicate for the portion of the conversation, which is the predicate of count one of the indictment, would fall if the remainder of the conversation had between Mrs. Jacobs and Mr. Stonesifer had in truth and in fact been placed on the recording device.

Now, if my facts are correct, and which I would seek to determine at the evidentiary hearing, it is to my best information that neither the United States Government, either through the Justice Department or by any federal agent, played any part in transcribing—in recording this conversation; that apparently what may have happened is that somehow Mr. Stonesifer related to local law enforcement from the location of the telephone call—that he was given equipment and operated that equipment himself at the time that he recorded this conversation. And I don't know whether the Federal Bureau of Investigation has the original tape that was used by Mr. Stonsifer and/or what type of machine was utilized, or whether Mr. Stonesifer was able to start or stop that machine, or how long Mr. Stonesifer had the machine in his possession, whether or not the tape consisted of more than one conversation whereby different pieces of the conversation were placed together.

And these are I believe proper questions for a suppression hearing to determine the validity of the tape recording that constitutes the predicate of the facts for count one of the indictment.

I am not suggesting to the Court that I have knowledge that such is the case, but I believe that I have a duty to establish for the record to protect my client's rights the facts and circumstances under which this particular tape recording came about. And apparently there was more than one conversation had between Mrs. Jacobs and Mr. Stonesifer.

Further, I state to the Court that apparently there may have been other tape recordings in the possession of other

non-law enforcement people who were taperecording the conversation at the end of the telephone that Mrs. Jacobs was speaking at to make sure that she was not accused of saying anything which might constitute a violation of the law.

Mr. Weiner was kind enough to inform me that he did in fact serve a subpoena duces tecum—I presume?

MR. WEINER: Yes.

MR. SEIDMAN: —upon Mr. Provenzano, who was the employer of Mrs. Jacobs. And Mr. Provenzano apparently informed Mr. Weiner and the Grand Jury that all those tapes had been destroyed. And I would—so there is an issue here as to what the exact conversation was as to the particular parties.

As a third point, your Honor, I submit that although this may merely be a technical defect, I raise the argument that there is no proof other than Mrs. Kramer—Mrs. Jacobs' own appearance before the Grand Jury that in truth and in fact that was she speaking on the telephone. And I submit that such is violative of her constitutional rights in the circumstances under which such was done, not being represented by counsel during that stage of the proceeding.

The last issue which I raise, in which there is a disparity of viewpoint, is whether or not this particular attorney had the authority or power to present this matter to a United States—

THE COURT: Christino.

MR. SEIDMAN: —Grand Jury.

I submit to the Court that other than raising it to preserve my client's right, I will not allude to it. Therefore, your Honor, I would request a suppression hearing in essence concerning the particular tape recording which is the predicate of count one of the indictment, and if necessary, assuming that it is not merely a question of law, and the transcripts of the Grand Jury do not speak for themselves, a suppression hearing concerning what Mrs. Jacobs was advised as to her posture when she appeared before the Grand Jury.

THE COURT: Now, this matter has been set for Monday, June 23. You are aware of that, gentlemen.

MR. SEIDMAN: Yes, your Honor.

THE COURT: And normally, if any suppression hearings were to be held, it would be held immediately before trial.

MR. SEIDMAN: Very well. I believe, your Honor, that you had stated——

THE COURT: Because I think there was something in your comment that suggested that perhaps you think—you think you are entitled to some further discovery from the Government.

MR. SEIDMAN: Well, I have to accept—and I have no doubt that Mr. Weiner is informing me of the facts as he knows them to be, that there are no other tape recordings. That is predicated upon the statement made to the U.S. Attorney—the Government by Mr. Provenzano or his attorney, whatever the case may be. And I would seek to subpoena Mr. Provenzano or others who might have in their possession a tape recording of the conversation from the receiving end of the telephone, which hopefully would exculpate the defendant.

THE COURT: You have already been informed that——

MR. SEIDMAN: Mr. Weiner I believe fulfilled his duty and made all and proper disclosure to me as he knows the facts, and that it is incumbent upon me as the attorney for the defendant to seek either through subpoena power and ultimately a hearing in which we can develop other facts as to the possibility of there being another tape recording of this conversation, and to determine whether or not the tape recording in possession of the Government in truth and in fact is a complete recording of the conversation.

THE COURT: All right. What do you say the constitutional issue——

MR. SEIDMAN: As the constitutional issue—as the tape recording being, one, truthfully of constitutional import, I question the mechanical recordation of this conversation.

THE COURT: Yes. But bear in mind that a suppression as such isn't concerned with whether evidence is relevant or admissible. Unless the admissibility is challenged on constitutional grounds. That is to say, the evidence is obtained in an unconstitutional manner. You indicated——

MR. SEIDMAN: Then I would fall back, your Honor, on my contention that I would seek to determine whether or not Mr. Stonesifer in recording this conversation was an

agent of the Government using the equipment of Government at the suggestion of Government to record this conversation, and whether or not such required a court-approved order in the circumstances.

THE COURT: You mean the sort—if the Court can't do it, the Government can't delegate somebody else to do it?

MR. SEIDMAN: That is correct, your Honor.

THE COURT: All right.

MR. SEIDMAN: Thank you.

THE COURT: Mr. Weiner?

MR. WEINER: May it please the Court, my name is Edward Weiner. I am a special attorney with the United States Department of Justice.

Your Honor, I think it might be easier to just follow the argument that was originally presented by Mr. Seidman in his papers and which we followed in our memorandum in opposition.

THE COURT: Well, you needn't argue the Christano——

MR. WEINER: I just want to point out for the benefit of Mr. Seidman—not for the Court—that the Second Circuit has affirmed the case of United States vs. Persico, which discussed the matter of a special attorney. And I believe Judge Judd of this court ruled that the special attorney letter in that case was good. And that was affirmed by the Second Circuit. And an opinion will follow, as I understand.

Now, the next issue that was raised in his brief had to do with the terminology of the questions in the Grand Jury and the answers that were sought from the defendant. And I notice Mr. Seidman neglected to argue that point to you.

I submit that the authority which we presented in our memorandum takes care of those points that were raised.

The two cases that he did feel necessary to mention, the Bursey and the Bronson cases, which are in opposition as we read those cases.

The next issue that he raised had to do with the entrapment of the defendant to commit perjury before the Grand Jury.

First of all, we would argue to the Court that even if the Court would want to decide this issue, it probably is an issue that should be raised as a defense at the trial of the case and not at the pretrial motion stage.

Secondly, we would argue that the defendant was in fact

fully informed of her Fifth and Sixth Amendment rights under the United States Constitution.

We will get to a discussion of the Manning Guana issue in just a moment.

The three cases cited by Mr. Seidman in his brief having to do with a special attorney or a U.S. attorney entrapping someone were cases, as we look at them, that had to do with abuse of discretion and an abuse of jurisdiction by the government attorney. Those cases are cited on page 11 of the Government's brief:

The government attorney cannot implant in a defendant's mind the implication to permit perjury. Perjury is committed by a person who has that opportunity.

The Court will look at the questions that were propounded and the answers that were given and I believe the Court will find that the questions were clear. There were negative, positive denials by the defendant in this case.

"No, I am absolutely positive I didn't say that. I deny. I know I am under oath."

I think there can be no question that the defendant in this instance under the question and answer in the negative as to whether or not they were true.

Now, next we would like to discuss the issue of the issues raised by Mondano. Mondano is a case which is now on petition to the United States Supreme Court from the Fifth Circuit Court of Appeals. The Government in that case contended that the Miranda warnings were not required to be given before a Grand Jury. In fact the Grand Jury process was different from a police process where the police interrogates an individual in the station house. The Mondano case—and there are only two others from our research. They are the only cases that have gone contrary to the position that we take in this court that the affirmative duty is only to inform the defendant of her Fifth and Sixth Amendment rights and not to inform her of her full Miranda rights: that is, to remain silent and the right to have counsel appointed, in addition to the other rights given under the Fifth and Sixth Amendments. There are twenty or thirty cases including all of the cases we found in the Second Circuit Court of Appeals, which are contrary to the defendant's position. And these cases are cited on pages 16 and 17 of the Government's Memorandum.

We would also submit that under the cases in the Second Court of Appeals that the full Miranda rights are not required to be given, and that the warnings under the Fifth and Sixth Amendments are sufficient.

Now, Mr. Seidman raised the issue that the Government's attorney has an obligation to fully explain the evidence to the defendant. That is, the tape recording. We take issue with that.

We submit that the defendant has not presented any case in authority for that proposition that the Government has a duty to disclose to the defendant evidence that the Government may have against the defendant or evidence that the Government may have in its investigation of the fact. In fact, that would be disclosing to a person not authorized to know evidence that is in the possession and in the hands of a Grand Jury and would be contrary to Rule 60(e) of the Federal Rules of Criminal Procedure.

Now, as to whether or not the questions that I proposed to the defendant during her Grand Jury appearance were clear, I would submit that is a factual question that this Court can decide based on the transcript of her answers to the questions where she said, "No, I am absolutely positive. I deny that. I know I am under oath."

I think it was clear that she knew that the Government was presenting either verbatim conversations or conversations that had been related by another witness—that is, Mr. Stonesifer, in this case.

As to what those conversations were, she knew that she understood her constitutional rights, as I think the Court will determine in looking at both appearances before the Grand Jury and in answer to those questions.

THE COURT: Let me ask you this:

MR. WEINER: Yes, sir.

THE COURT: When she was first called before the grand jury, did the Government at that time consider her a target of the grand jury?

MR. WEINER: She was a putative defendant.

THE COURT: She was a——

MR. WEINER: In the language of Manando.

THE COURT: But was she ever told in so many words that she was a putative defendant?

MR. WEINER: In her first appearance, I believe it is not—it is my policy when I question witnesses before the

grand jury—and I am sure the Court has examined transcripts and has done it himself—to inform various people of their constitutional rights. Sometimes you don't inform people who are not targets of the grand jury investigation of their constitutional rights. You just go into asking questions without informing them of their Fifth and Sixth Amendment rights. I do that on occasion. I inform a witness of his Fifth and Sixth Amendment rights.

I believe in Mrs. Jacobs' appearance before the grand jury on November 4, 1974, which was her second appearance—and an appearance which is not at issue in the allegation in count 2 of the indictment—she asked the Government prosecutor whether in fact she was a target of the—on a subject—I am sorry—of the grand jury investigation. And she was told she was in fact a subject of the grand jury investigation. She was informed outside of the grand jury room. And I as an officer of the court informed the court and defense counsel that she was asked if she wanted to have an attorney present with her. She was afforded that opportunity. She was perhaps asked four or five times whether she was coming in before the grand jury with an attorney present. And each time she was—twice she was in the grand jury. Each time she was informed of her rights and chose not to have an attorney with her.

Now, I might add, with regard to Mr. Seidman's argument about full disclosure of evidence required—that is, the Government, under his contention, I guess, it would be a due process argument that it would be required to disclose that we had a tape recording, to play that tape recording for him and to have the defendant listen to it. He cites Kestigard, which I believe had to do with an illegal wiretap.

There is no contention in this case at all that the tape recording, the consentual tape recording taken from Mr. Stonesifer was at all illegal evidence. And the Kestigard case and whatever case Mr. Seidman chooses to cite has to do with illegal evidence.

There is no contention that the evidence was illegal in the grand jury. And I believe the case of Paris v. New York held that. The case of Kalantra, which is cited on page 12 of the Government's memorandum, has to do with what evidence the grand jury can bring an indictment under. And the Kalantra case is clear that the grand jury had wide range and can bring an indictment under evidence

which would not be sufficient in a court of law which they, as a grand jury of twenty-three men and women hearing the evidence, decided that an indictment is proper. The trial court and the petit jury are the ones to decide whether the evidence proves beyond a reasonable doubt the allegation. The grand jury can indict, according to the Kaylan case, based on insufficient evidence or even hearsay, or even in fact illegal evidence. And it is not the obligation of the Government's attorney to provide the defendant with what evidence in fact the grand jury is hearing in order to indict that defendant.

I think if the Court doesn't have any further questions concerning the Monando issue and the entrapment, I will just summarize the argument by saying that everyone who comes into the grand jury cannot come in and say, "I am not going to tell you my name. I am not going to tell you my address. I am not going to tell you my occupation."

When a defendant comes in—even a putative defendant, has to come in and give his name and answer those questions that are appropriate. And if he chooses to assert his Fifth Amendment rights, privilege against self-incrimination through those questions which may be self-incriminatory—a defendant or anyone cannot come before a grand jury and refuse to talk at all.

Now, the next issue that was raised in the original motion papers had to do with the sufficiency of the grand jury evidence and the identity of the so-called Mrs. Kramer. And I might add that there were other witnesses who testified before the grand jury. And I think I mentioned in my motion papers that Mr. Walter Cox and Mr. Frank Provenzano testified without fully disclosing to the Government evidence, and I can represent to the Court there was testimony sufficiently establishing the fact that the defendant, Estelle Jacobs, did in fact use the alias, Mrs. Kramer, other than her testimony admitting that she did. And, in fact, I can represent to this Court as an officer of the court that the grand jury heard the tape recording and was able to make its own comparison of the voice of Mrs. Jacobs in her two appearances and the voice they heard on the tape recording.

So based on that I would say that the argument of Mr. Seidman is based on no authority at all as to the identity of the defendant.

He mentioned an argument—and I think this has to do with the recorded conversation or the suppression hearing requested by the defendant. And as the Court pointed out, a suppression hearing has to be based on some constitutional argument or some alleged illegality. It can't be a fishing expedition for any so-called mechanical deficiency in the tape recording or any other tapes or evidence that may exist. That's a matter that can be brought up either on cross-examination of Mr. Stonesifer or at trial, or of subpoenaing witnesses to the defendant's own behalf and presenting those witnesses at trial. It is not a matter for this court to determine in an independent suppression hearing.

Now, there was a case that I was able—I guess to interrupt Mr. Seidman and point out that the case of United States v. White, 401, U.S. 616, 71, points up that the Government—and, in fact, an informant or any other person operating under the auspices of law-enforcement officials does not need to get a court order in order to consentually record any conversations that may exist over the telephone or conversations that may have been heard in a room.

And I think probably for Mr. Seidman's benefit, an expert in this case might be sufficient to stop his search for cases supporting his position because we have not found any.

The White case on page 751 cites Hoffa v. United States, 385 U.S. 293, which was left undisturbed by Katrina. As the Court will remember, Katrina was the original case by the United States Supreme Court that led to the strict rules under wiretapping, and held that however strongly a defendant may trust an apparent colleague, that in this respect he is not protected by the Fourth Amendment when it turns out the colleague is a Government agent.

In these circumstances no protection by the Fourth Amendment is involved. And without that amendment affording no protection to wrongdoing, misbelief to a person who voluntarily confides his wrongdoing will not recite it. In other words, Stonesifer revealed the tape recording himself and he turned it over to law enforcement.

And the cases go on to say that no warrant to search and seizure is required in such circumstances. And nor is it when the Government sends to the defendant's home a secret agent who conceals his identity.

So taking Mr. Seidman's argument one step further,

under the White decision, even if law enforcement was involved in the overhearing of the conversation with regard to the Stonesifer tape recording, no warrant, no court order is required.

THE COURT: All right.

MR. WEINER: I think there is one issue that has to do with the discovery material. And that was answered in the Government's memorandum.

I should say that Mr. Seidman requested the letter of authority of the Special Attorney, which is on file with the Court and the Clerk's Office, and he requested the letter with regard to the empanelling of this particular grand jury.

I might say with regard to that, that term might be—that would be available to the Court for an in camera inspection if the defendant could have some showing that there is some illegality or some lack of the proper procedure in the empanelling and the order empanelling this grand jury. There have been none shown to this Court by Mr. Seidman.

In summary, we would ask the Court to follow the rule under the Second Circuit upholding the letter of the Special Attorney and deny all the pretrial motions.

THE COURT: Well, I would say that I suppose I should see a copy of the letter.

MR. WEINER: I have a copy that was taken back to the Department of Justice. It is sworn before the Clerk. It has the letterhead of Henry Petersen, the then Assistant Attorney General, whose signature does not appear on this carbon copy, but whose signature does appear on the original.

THE COURT: That would be the letter that would be filed downstair.

MR. WEINER: Yes. The letter and the oath was filed on March 18, 1974.

THE COURT: Does Mr. Seidman have any question about that?

MR. SEIDMAN: Well, if I might see it, if your Honor please?

THE COURT: Yes.

MR. WEINER: Excuse me, your Honor. I understand that the Court has followed the opinion of Judge Milton Pollack in the Brown case in United States v. Tolker.

THE COURT: Yes, I have.

MR. SEIDMAN: If your Honor please, there is a memorandum dated February 15, 1974, which is annexed to the document offered to the Court. And I would ask Mr. Weiner whether or not the memorandum dated February 15, 1974 resulted in the letter dated February 20, 1974.

MR. WEINER: Well, the memorandum referred to is an internal department memorandum, but was not filed in the court, and which is not required to be filed. And the answer is yes, that memorandum tells the Assistant Attorney General, who is delegated by the Attorney General under 28 USC 515(a), that I am requesting authority to proceed in the Eastern District of New York, and his office then prepares the letter and directs it to me.

THE COURT: I see.

MR. SEIDMAN: If your Honor please, I specifically call to the Court's attention the fact that the letter dated February 20, 1974 in no way makes reference to any particular matter or case. It makes no reference to this particular defendant and her matter. And for that reason and all the reasons cited in the Christino case, I respectfully submit to the Court that—and I am in no way questioning Mr. Weiner's professional abilities.

THE COURT: No, I understand.

MR. SEIDMAN: That is the legal standing to present this matter to the grand jury for the Eastern District of New York. It is not one which was properly authorized and as required by statute.

THE COURT: But I mean you are not questioning Mr. Weiner's statement that that is a true copy or an accurate copy.

MR. SEIDMAN: I do not question him as to that. Certainly not. And I won't assume that any lawyer would be foolhardy to present anything but the——

THE COURT: Are you in a position to submit that or a copy to the Court?

MR. SEIDMAN: If your Honor please, for the purposes of the record, I would be appreciative of Mr. Weiner if he can inform me as to whether or not the grand jury, before which this matter was presented, was one of the special types of grand juries permitted by statute or a regular grand jury for the Eastern District of New York which was

extended in view of the fact that the time sequence between the appearances of Mrs. Jacobs before the grand jury.

MR. WEINER: It was a special grand jury.

THE COURT: All right. Eighteen months?

MR. WEINER: Empanelled for eighteen months and then subsequently twice I believe.

THE COURT: I see. All right. Well, I will take the matter under advisement. But it won't affect the present trial date.

MR. SEIDMAN: I understand that, your Honor.

MR. WEINER: May we approach the bench?

THE COURT: Yes.

(Conference held at the bench, outside the hearing of the Reporter.)

• • •

Typed 2/20/74
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February 20, 1974

Mr. Edward C. Weiner
Criminal Division
Department of Justice
Washington, D. C.

Dear Mr. Weiner:

The Department is informed that there have occurred and are occurring in the Eastern District of New York and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.

As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General

Mr. Washington
Attorney File

DEPARTMENT OF JUSTICE

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: February 15, 1974
ETJ:jeo

TO : Henry E. Petersen
Assistant Attorney General
Criminal Division

FROM : William S. Lynch, Chief
Organized Crime and Racketeering Section

SUBJECT : *Grand Jury Authority*

It is requested that Grand Jury authority be prepared and issued to Edward C. Weiner for the Eastern District of New York. This authorization is needed for his assistance in *United States* v. *John Doe* (Woods and Jacobs, 18 U.S.C. 1951).

This authorization is needed by February 21, 1974.

SUPREME COURT OF THE UNITED STATES

No. 76-1193

UNITED STATES,
Petitioner,

v.

ESTELLE JACOBS, aka "MRS. KRAMER"

ORDER ALLOWING CERTIORARI. Filed May 31, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

☆ U.S. Government Printing Office: 1977—239-653/35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1193

UNITED STATES OF AMERICA,
Petitioner,

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER",
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
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OCTOBER TERM, 1976

No. 76-1193

UNITED STATES OF AMERICA,

Petitioner.

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER"

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States of America, has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals on remand is not yet reported. The original opinion of the court of appeals is reported at 531 F.2d 87. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a court of appeals possesses and may exercise supervisory powers to attempt to establish fair and even-handed administration of criminal justice in the circuit, by suppressing a defendant's grand jury testimony on the ground that the prosecutor did not warn the witness that she was a putative defendant, against whom the government had incriminating evidence.

STATEMENT

Respondent made telephone calls as part of her duties as an employee of a debt collection agency. Without her knowledge, the recipient of one of these calls from Respondent tape-recorded their conversation, during which Respondent allegedly made threatening statements. Several months later, after Respondent had been questioned by the Federal Bureau of Investigation, she was subpoenaed to appear before a grand jury sitting in the Eastern District of New York.

Prior to her grand jury appearance, Respondent was not told that she had a right to remain silent before the grand jury. She was also not told that counsel would be provided for her if she were unable to bear the expense herself. Furthermore, she was not told that she was a putative defendant against whom the government held significant incriminating evidence, particularly the tape-recording of the allegedly threatening telephone conversation. Respondent was unrepresented at the time of her testimony, stating that she did not feel that she was in need of counsel.

During the course of her grand jury appearance, Respondent was questioned about the telepohne conversation which had taken place many months earlier. Respondent answered from memory questions propounded

by the government attorney which were, unbeknownst to Respondent, based on a transcript of the recording of the conversation which was the subject of inquiry. Respondent was indicted for perjury.

Before trial, Respondent moved to suppress her grand jury testimony on the ground that the government's warning to her had been inadequate. The district court granted the motion, basing its decision on a due process analysis. The perjury charge was dismissed.

The court of appeals affirmed the decision of the district court and held that Respondent's grand jury testimony was properly suppressed. The court of Appeals did not, however, base its decision on fifth amendment self-incrimination and due process considerations. Instead, the Second Circuit found that the government's act of questioning Respondent before the grand jury, without informing her that she was a putative defendant, was not only outside the penumbra of fair play, but was also not in conformity with established prosecutional practice in the circuit. Basing its decision on the need to secure uniform criminal procedure within the circuit, the court of appeals exercised its supervisory powers and affirmed the suppression of the grand jury testimony.

On November 1, 1976, the Court granted Respondent's petition for a writ of certiorari (No. 75-1883), vacated the judgment of the court of appeals, and remanded for reconsideration in light of *United States v. Mandugano, infra.*

On remand, the court of appeals adhered to its decision, stating it had anticipated (and agreed with) this Court's ruling in *Mandujano* and that its own ruling had not relied upon the Fifth Circuit's opinion in that case.

REASONS FOR DENYING THE WRIT

In the decision under consideration here, the court of appeals decided to exercise its power to supervise the administration of criminal justice within the circuit to secure the goal of uniform and just criminal procedure. It cannot be denied that the federal courts possess such supervisory power. The particular application of this power here, to require that putative defendants be given fair warning of their actual status prior to appearing before a grand jury, conflicts with no law of Congress, decision of this Court or of any other court of appeals. What Petitioner seeks is, in effect, for this Court either to hold that the courts of appeal do not have power to supervise grand jury procedures or to substitute its own idea of desired procedure for that of the court below.

1. That the federal courts have power to supervise the administration of federal criminal justice is a fundamental tenet of long and uniform acceptance. This supervisory power may be exercised by suppression of otherwise relevant evidence for reasons not limited to application of only minimal constitutional guarantees. This principle has been accepted as basic since the decision of this Court in *McNabb v. United States*, 318 U.S. 332 (1943). The reasoning which underlies the exercise by any federal court of its power to supervise criminal justice was stated in that case:

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force . . . Considerations of large policy in

> making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.
>
> The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, . . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

318 U.S. at 340-341. (Citations omitted). Particularly applicable to the issue presented here is the statement in *McNabb* that:

> The function of formulating rules of evidence in areas not governed by statute has always been one of the chief concerns of courts: "The rules of evidence on which we practise today have mostly grown up at the hands of the judges; and, except as they may be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped." J.B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) pp. 530-31.

Id. at 341, n. 1.

The courts of appeal certainly believe that they possess power to supervise the administration of criminal justice within their respective circuits. This fact is amply illustrated by the statement of the Ninth Circuit in *Burton v. United States*, 483 F.2d 1182 (9th Cir. 1973):

> Finally, we conceive it to be our duty, exercising our supervisory power, to assure that there be the strictest compliance with the requirement of Rule 11. That this court has such supervisory power is hardly deniable. In La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed. 2d 290 (1957), the United States Supreme Court held that ". . . supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." *Id.* at 259-260, 77 S.Ct. at 315. Moreover, this pronouncement by the Nation's supreme judicial authority has been reaffirmed by every Court of Appeals, including our own, that has confronted the issue.

483 F.2d at 1187. Especially significant is the extraordinary recitation of authorities presented by the *Burton* court in support of its view.

Of course, the power of federal courts to supervise the administration of criminal justice may be circumscribed by Congress, if that body decides to assert its authority in respect to a particular matter of criminal procedure. Congress has not acted in the matter of the suppression of testimony extracted from a witness appearing before a grand jury without having been apprised that the focus of the investigation may be directed at the witness himself.

Petitioner propounds two general Acts of Congress relating to the admissibility of evidence and asserts that certain phrases of those acts, taken out of context, operate to void the well-recognized power of federal courts to supervise criminal practice in their circuits. In Support of its argument, Petitioner extracts from 18 *U.S.C.* §3501(a) the phrase: "shall be admissible in evidence if it is voluntarily given." That section, part of the *Omnibus Crime Control and Safe Streets Act of 1968*, is not applicable to this case, and was not, for this reason, relied on

by the courts below. Its basic inapplicability is amply shown when the section from which the asserted phrase was taken is read in its entirety:

> In any criminal prosecution brought by the United States or by the District of Columbia, a *confession*, as defined in subsection (c) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the *confession* was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

18 U.S.C. §3501(a) (emphasis added). In fact, this statute was not intended to apply to situations such as is involved here. Subsection (c) of §3501 forms the operational core of the statute. It provides, in pertinent part:

> In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, which such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate . . . .

18 U.S.C. §3501(c). The legislative history of this particular statute was carefully examined in *United States v. Halbert*, 436 F.2d 1226 (9th Cir. 1970), where it was concluded:

> [I]t is obvious that the prime purpose of Congress in the enactment of §3501 was to ameliorate the

> effect of the decision in Mallory v. United States (1957), 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed. 2d 1479, to remove delay alone as a cause for rejecting admission into evidence of a confession and to make the voluntary character of the confession, the real test of its admissibility.

436 F.2d at 1231. In fact, resort to the legislative history of this provision clearly reveals that Congress did not intend the section to operate to prevent a court from exercising its supervisory power to secure the enforcement of criminal law by methods which fall within the penumbra of fair play. As is stated in Senate Report No. 1097, 90th Cong. 2d Sess. 1968:

> This title would restore the test for the admissibility of confessions in criminal cases to that time-tested and well-founded standard of voluntariness. It would avoid the inflexible rule of excluding such statements *solely* on technical grounds such as delay or failure to warn the accused as to his rights to silence or to counsel. We have not nullified, however, the rights of defendants to the safeguards of federal law or the Constitution. On the contrary, we have provided a more reasonable rule in that the judge shall consider all the defendant's rights (speedy arrangement, silence, counsel, *knowledge of offense charged*) and their possible violation in deciding as to the voluntariness of the confession and thus its admissibility.

U.S. Code Cong. & Admin. News 90th Cong., 2d Sess. and 2282 (1968) (emphasis added).

The disclaimer contained in subsection (d) of the statute cannot, of course, be construed as a requirement that any "confession" must be admitted under all circumstances, as that subsection merely states that:

> Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

18 U.S.C. §3501(d).

The thrust of Petitioner's argument, therefore, is based on the citation of this non-applicable statutory enactment, and the even more general language of Rule 402 of the *Federal Rules of Evidence.* Petitioner asserts that, once Congress has used the phrase "admissible," the federal courts have lost the power to suppress evidence. That notion is, of course, not supported by analysis. The statutes cited do not mandate the admission of evidence in any and all circumstances. This fact is shown by the context of 18 U.S.C. §3501 in its entirety and is even more cogently illustrated by the fact that, while Rule 402 broadly proposes that "All relevant evidence is admissible . . . ," Rule 403 of the same *Federal Rules of Evidence* sets out a wide variety of factors which would call for the exclusion of such "admissible" evidence.

A good example of the accommodation of the supervisory power of the federal courts in matters of criminal justice — particularly in respect to grand jury proceedings — with specific enactments of Congress is provided in *In re Grand Jury Proceedings.* 486 F.2d 85 (3d Cir. 1973). There, the Third Circuit found that particular provisions of the *Crime Control Act of 1970* did not tie the hands of the court with respect to procedures not covered by the particular statute. The court was free to use its inherent supervisory powers to secure grand jury procedures which would be consonent with considerations of fair play, not limited to the bare requirements of the Constitution. *See also In re Grand Jury Proceedings.* 507 F.2d 963 (3d Cir. 1975), *cert. denied.* 421 U.S. 1015 (1975).

2. In an attempt to persuade this Court to grant certiorari, Petitioner asserts that a conflict exists between the decision in this case and that of the Third Circuit in *United States v. Crook*, 502 F.2d 1378 (3d Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975). No such conflict exists, as the only similarity between the cases is that each involves the issue of the proper use of the court's supervisory power to suppress testimony. In *United States v. Crook*, the court found that a criminal defendant in custody had been given warnings in full compliance with the requirements of the *Miranda* decision and, hence, the fifth and sixth amendments. Section 3501(a) applied to control the question of the admissibility of a confession. That is not the situation presented here. The holding of the Third Circuit that a court cannot exercise supervisory power to suppress testimony in a case which falls squarely within the scope of a Congressional enactment presents no conflict with the decision of the Second Circuit to utilize supervisory powers in a situation to which no statute directly applies.

3. The powers of a federal court to supervise the administration of criminal justice are not limited to enforcement of minimal constitutional rights. As was cogently stated in *McNabb, supra*, a federal court may develop standards of criminal procedure which more adequately guarantee fairness and justice than is secured by adherence to only the bare bones of constitutional protections. The courts of appeals have consistently acted in conformity with this power, as is illustrated by the decision in *United States v. Charamie*, 520 F.2d 325 (5th Cir. 1975). There, the court of appeals used its supervisory powers to require that the district courts limit their use of supplementary jury instructions in a manner more restrictive than would otherwise be required by the Constitution itself.

This principle has also been noted in support of the exercise of supervisory power to require uniform conduct

by the government in enforcing criminal sanctions. *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970). That court correctly perceived that a federal court's supervisory power permits it to go beyond minimal constitutional requirements if that is necessary to assure "citizens' faith in the even-handed administration of laws . . . " 434 F.2d at 10.

The propriety of the decision of the court of appeals in this case is further illustrated by the fact that the governmental prosecuting agencies in the circuit have themselves established a uniform policy of informing grand jury witnesses that they are putative defendants. The decision in this case served to protect this particular defendant from the consequences of an isolated deviation from this uniform practice, which the court found to be outside the penumbra of fair play.

Of course, the Second Circuit's decision here does not conflict with the decision of this Court in *United States v. Mandujano*, 425 U.S. 564, 96 S.Ct. 1768 (1976). There, it was held that the fifth amendment privilege against self-incrimination did not require the suppression, in a prosecution for perjury, of false statements made to a grand jury, even though the defendant had not been given *Miranda* warnings when called before the grand jury as a putative defendant. The decision here is explicitly *not* based on the constitutional grounds which were rejected in *Mandujano*. The sole basis of the decision here was the court's perception that an unfair prosecutional tactic should be eliminated from the administration of criminal justice in the circuit by the exercise of supervisory powers. The *Mandujano* case cannot be read as espousing a policy which would give support to a prosecutorial practice rejected by prosecuting attorneys in the circuit themselves. *See also United States v. Doss*, 545 F.2d 548 (6th Cir. Nov. 1976).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Irving P. Seidman, Esq.
Rubin, Seidman & Dochter, Esqs.
Attorneys for Respondent
425 Park Avenue
New York, New York 10022
(212) 486-3330

March, 1977

No. 76-1193

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER"

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
WILLIAM F. SHEEHAN, III,
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KATHERINE WINFREE,
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Department of Justice,
Washington, D.C. 20530.

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UNITED STATES OF AMERICA, PETITIONER

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ESTELLE JACOBS, A/K/A "MRS. KRAMER"

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. A, pp. 1A–14A) is reported at 547 F. 2d 772. The first opinion of the court of appeals (Pet. App. B, pp. 15A–22A) is reported at 531 F. 2d 87. The opinion of the district court (Pet. App. E, pp. 26A–32A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976. On January 21, 1977, Mr. Justice Marshall extended the time within which to file a

petition for a writ of certiorari to and including February 28, 1977. The petition was filed on that date and was granted on May 31, 1977 (A. 85). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals possesses and should exercise supervisory power to suppress a defendant's allegedly perjurious grand jury testimony for the sole reason that the prosecutor neglected to follow the usual practice of other federal prosecutors in the circuit of giving "target" warnings to grand jury witnesses against whom the government has incriminating evidence.

STATUTE AND RULE INVOLVED

18 U.S.C. 3501 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> * * * * *

> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authortiy. Evidence which is not relevant is not admissible.

STATEMENT

1. During May 1973, in the course of her employment by a debt collection agency, respondent made numerous telephone calls to relatives of a delinquent gambling debtor she was attempting to locate (A. 5, 16–17, 60). Without her knowledge, the debtor's brother tape-recorded a call during which she allegedly threatened the debtor with physical harm if he did not pay up (Pet. App. 16A). On September 13, 1973, agents of the Federal Bureau of Investigation, after giving respondent full *Miranda* warnings and observing her sign a waiver of rights form (*id.* at 16A–17A), questioned her about the call. They did not tell her that it had been recorded, and she denied making any threats (*id.* at 17A).

On June 10, 1974, respondent appeared pursuant to subpoena before a grand jury in the Eastern District of New York. She was not given the complete *Miranda* warnings to which individuals facing custodial

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interrogation are entitled,[1] nor was she told that she was a "target" of the grand jury investigation and subject to indictment. The government attorney did, however, advise respondent of her Fifth Amendment privilege against self-incrimination and told her that she had a right to have counsel of her choice outside the grand jury room and to consult with him or her at any time.[2] She was also cautioned that perjury is a serious offense (A. 4), and before testifying she swore that her testimony would be truthful (A. 2).

[1] The government did not tell respondent either that she had an absolute right to remain silent before the grand jury or that counsel would be provided for her if she were unable to bear the expense herself.

[2] The relevant colloquy was as follows (A. 3–4):

"Q. Mrs. Kramer [a name respondent often used when making telephone calls in the course of her employment], I want to explain to you your various Constitutional rights that you have as a witness who appears before a Federal Grand Jury. I want to tell you that this is a Federal Grand Jury inquiring into the possibility of a violation of the Federal Criminal Law, and the first right you have is the right under the Fifth Amendment to refuse to answer any question that you feel might tend to incriminate you; do you understand what your rights are under the Fifth Amendment?

"A. Yes.

"Q. At any time you feel the questions I am asking may tend to incriminate you, you will not be obliged to answer those questions; do you understand that?

"A. Yes, I do.

"Q. And now, do you understand that the Fifth Amendment privileges against self-incrimination, that that privilege is extended to you and not to any information or to any other individual that might be incriminated; do you understand that right?

"A. Yes, I do.

"Q. Now, the next right you have under the Sixth Amendment, is the right to counsel; you can have a lawyer of your choice outside of the Grand Jury room to assist you with any questions that you may have a question with. You may have a question about

Government counsel then questioned respondent about her employer's business in general and the role she played in it (A. 7–18). Again she was not told about the recording. She denied unequivocally having made certain statements that the government attorney read to her from a transcript of the recorded conversation,[3] and the grand jury indicted her for

the procedures or any specific questions, that you may have an opportunity to leave the Grand Jury room and consult with your attorney; do you understand that right?

"A. Yes, I do.

"Q. Do you have an attorney with you today?

"A. No, I do not.

"Q. Now, do you feel the need of one?

"A. I do not.

"Q. And now, at any time you feel like stepping outside the Grand Jury room to call an attorney or consult with an attorney, you let us know and we'll give you that opportunity.

"A. Fine."

[3] The pertinent testimony was as follows (A. 23):

"Q. I'm going to read some direct quotes to you, Mrs. Jacobs, and I want to know whether or not you said them?

" 'Mrs. Kramer. Well, you know what's going to happen to him one of these days.

" 'Bill. Well, he's going to die [' he' refers to the debtor, who by then was known to be suffering from leukemia] and now that's besides the point.

" 'Mrs. Kramer. Sooner than he expects.

" 'Bill. No. I don't.

" 'Mrs. Kramer. Sooner than he expects. Maybe it's going to be painful to be honest with you.'

"A. I never said that.

"Q. Are you absolutely positive that you never said that?

"A. Absolutely positive.

"Q. Now, you're under oath——

"A. I never said that.

"Q. You never said to anyone these words, 'Maybe it's going to be painful, to be honest with you.'

"A. I never said it. I know I'm under oath.

perjury, in violation of 18 U.S.C. 1623 (A. 60–62).[4]

2. Before trial, respondent moved to suppress her grand jury testimony on the ground that the government's warnings to her had been inadequate. After an evidentiary hearing (A. 63–82), the district court granted the motion, relying on *United States* v. *Mandujano*, 496 F. 2d 1050 (C.A. 5), subsequently reversed, 425 U.S. 564, and *United States* v. *Washington*, 328 A. 2d 98 (C.A. D.C.), also subsequently reversed, No. 74–1106, decided May 23, 1977. The court ruled that the government's questioning of respondent, without first giving her full *Miranda*

"Q. Now, did you know the statute of perjury?

"A. Yes. I never said that.

"Q. We'll continue.

" 'BILL. Well, you know it's got nothing to do with me.

" 'MRS. KRAMER. I mean it's really a shame, but he's gonna get his pretty soon, just a matter of hours to be honest with you and as I told you, I'm being honest with you. We didn't like going to the mother, but we will.

" 'BILL. Well, you know.'

"Q. (continuing) Do you recognize those words?

"A. Not exactly.

"Q. You had some sort of conversation?

"A. By the way of saying I wish you could contact your brother.

"Q. Did you say, 'What he's going to get his pretty soon'?

"A. I did not.

"Q. You absolutely deny that statement?

"A. Yes. I deny it."

[4] Respondent was also indicted for transmitting in interstate commerce a threat to injure, in violation of 18 U.S.C. 875(c). That count is not involved here.

Respondent also appeared before the grand jury on November 4, 1974 (A. 27–59), at which time she was told she was a subject of the investigation (A. 28). The perjury charged related only to her testimony at her first appearance.

warnings and advising her that she was a "putative defendant," was "so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process" (Pet. App. 31A). Without her grand jury testimony the government would be unable to prosecute the perjury count, and the district court accordingly dismissed it (*id.* at 31A–32A).

The court of appeals affirmed, although for different reasons. It expressly declined to reach the constitutional issues that had been argued in the district court and on appeal (Pet. App. 19A) and ruled instead, "solely under [its] supervisory power" (*id.* at 22A), that suppression was necessary because the government's failure to give a "target" warning in this case departed from prevailing, circuit-wide prosecutorial practice and created what the court believed to be an intolerable lack of "uniformity in criminal procedure within the circuit" (*ibid.*).[5] In the court's view, the government's conduct in this case, "if not in actual violation of the Constitution, is, at least, outside the penumbra of fair play" (*id.* at 21A).

[5] Upon learning that the government attorney who had questioned respondent before the grand jury—a "Strike Force" attorney—had not told her that she was a "target" of the investigation, the court directed its clerk to poll the six United States Attorneys in the Second Circuit to learn their practice in this regard. Each replied that he customarily warns grand jury witnesses who are "putative defendants" of their status. This survey indicated to the court that respondent would have been warned that she was a "putative defendant" if she had been subpoenaed by the United States Attorney, yet "the Strike Force operating in the same district failed to give her such warning" (Pet. App. 21A).

3. This Court granted the government's petition for a writ of certiorari (No. 75–1883, 429 U.S. 909), vacated the judgment of the court of appeals, and remanded for reconsideration in light of the intervening decision in *United States* v. *Mandujano, supra* (holding that the Fifth Amendment privilege against compelled self-incrimination does not require the suppression, in a perjury prosecution, of allegedly perjurious grand jury testimony of a witness who was not given full *Miranda* warnings).

On remand, the court of appeals adhered to its decision. It said (Pet. App. 3A–4A) that it had anticipated (and that it agreed with) this Court's ruling in *Mandujano,* but that its own ruling had not been based on constitutional grounds but on its conception of its "duty to avoid uneven justice in the circuit, resulting from [the government's] mere negligence or inattention to established practice and guidelines" (*id.* at 6A). The court acknowledged (*ibid.*) that the government could equally well achieve uniformity by adopting a practice of never giving "target" warnings in any case. It held that, since "the policy of the various prosecutors should be uniform," and since "[i]t is an important function of the administration of criminal justice to let our citizens know that equal justice is available to all" (*ibid.*), the "sanction of suppression is salutary in the circumstances" (*id.* at 8A). The court further explained that it was imposing that sanction for a "didactic purpose" (*id.* at 13A), and to prevent "chaos in criminal law administration through the presence in the same district of a two-

headed prosecution branch operating on conflicting procedures" (*id.* at 12A). The sanction was especially appropriate, in the court's view (*id.* at 7A), because respondent remained subject to prosecution for the substantive offense (see note 4, *supra*); in these circumstances the government "was [not] entitled to the luxury of a perjury count" (*id.* at 7A).

In addition, the court of appeals rejected the government's arguments that its exercise of supervisory powers to suppress respondent's testimony was barred by both 18 U.S.C. 3501(a), which provides that voluntary confessions "shall be admissible," and by Rule 402 of the Federal Rules of Evidence, which provides that "[a]ll relevant evidence is admissible" except when exclusion is required by the Constitution, a federal statute, or a rule promulgated by this Court pursuant to statutory authority. It ruled that respondent's denials in the grand jury were not "self-incriminating" statements for purposes of Section 3501 (a) (Pet. App 11A) and that the Federal Rules of Evidence are not "concern[ed] * * * with the supervisory powers of the federal courts" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *McNabb* v. *United States,* 318 U.S. 332, this Court first explicitly announced and asserted the judiciary's "supervisory" power over the administration of justice in the federal courts. There it was suggested that the power derived from the Court's authority to formulate common law rules of evidence for use

in federal criminal trials (*id.* at 341),[6] an authority that was firmly established in *Funk* v. *United States*, 290 U.S. 371, and sanctioned by Congress in former Rule 26 of the Federal Rules of Criminal Procedure.[7] In many cases the Court's use of the "supervisory" power has been so limited.[8]

In other cases, however, the supervisory power has assumed a broader role. The Court has invoked it, for example, to enjoin a federal officer from testifying at a state criminal trial about evidence he seized unlawfully (*Rea* v. *United States*, 350 U.S. 214); to require an administrative agency to reopen proceedings to consider whether the testimony of certain witnesses had been perjured (*Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115); and to reverse a defendant's convictions on several counts where the circumstances, which included "one judge's clearly expressed intention to impose a five-year sentence" and "another judge's imposition of

[6] See also *United States* v. *Mitchell*, 322 U.S. 65, 66 ("Practically the whole body of the law of evidence governing criminal trials in the federal courts has been judge-made. * * * The *McNabb* decision was merely another expression of this historic tradition, whereby rules of evidence for criminal trials in the federal courts are made a part of living law and not treated as a mere collection of wooden rules in a game."); Note, *Evidence—Confessions—Voluntary Confessions of Defendants While in Illegal Custody Held Inadmissible*, 56 Harv. L. Rev. 1008, 1009 (1943).

[7] See 2 Wright, *Federal Practice and Procedure* § 401, pp. 60–62 (1969).

[8] See, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206; *Jencks* v. *United States*, 353 U.S. 657, 668; *Grunewald* v. *United States*, 353 U.S. 391; *Gordon* v. *United States*, 344 U.S. 414; *Upshaw* v. *United States*, 335 U.S. 410.

a twenty-year sentence," were not "consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts" (*Saldana* v. *United States*, 365 U.S. 646, 647).[9]

Whatever the ultimate source and precise scope of the judicial supervisory power,[10] this Court's decisions clearly establish two limitations on its exercise. First,

[9] In addition, the Court has used the supervisory power to consider, in passing on a claim of insufficiency of evidence, a transcript not officially part of the record (*Mortensen* v. *United States*, 322 U.S. 369); to reverse judgments without inquiring into actual prejudice to the parties where daily wage earners (*Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 225) or women (*Ballard* v. *United States*, 329 U.S. 187, 192–193) were systematically excluded from jury lists; to order a new trial where the government questioned the credibility of one of its witnesses (*Mesarosh* v. *United States*, 352 U.S. 1; cf. *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233); to reverse a contempt conviction and to remand for further proceedings before a different district court judge (*Offutt* v. *United States*, 348 U.S. 11, 13); and to reverse a conviction where jurors had seen prejudicial newspaper accounts of the defendant's past criminal conduct (*Marshall* v. *United States*, 360 U.S. 310, 313).

[10] See generally Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963). By and large, the supervisory power has been recognized and exercised in the context of review of events occurring in or directly affecting the trial or administrative proceeding under review in the appellate court. See Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 Geo. L. Rev. 1050, 1056 (1965). The *McNabb-Mallory* line of cases and *Rea* are the only ones we know of in which the supervision was directed at conduct of government officials outside the trial context, with a judicial remedy being forged in response to official violations of constitutional or statutory rights. The court of appeals in the present case, however, has asserted the power to supervise conduct of executive officials that neither occurred within the confines of respondent's trial nor violated any of her constitutional or statutory rights.

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the supervisory power is subordinate to the paramount authority of Congress to declare, within constitutional limitations, what practices and procedures will govern trials in the federal courts. This limitation was adverted to in *McNabb* (318 U.S. at 341, n. 6) and expressly declared in *Palermo* v. *United States*, 360 U.S. 343, 353, n. 11: "The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress."[11]

Second, even when not precluded by an Act of Congress, the courts' use of supervisory powers to exclude material evidence must be "sparingly exercised," and then only when "overriding considerations" justify it. *Lopez* v. *United States*, 373 U.S. 427, 440. "[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice." *Elkins* v. *United States*, 364 U.S. 206, 216.

The court below disregarded both of these limitations. We show in Part I, *infra*, that two Acts of Congress—Rule 402 of the Federal Rules of Evidence and 18 U.S.C. 3501—prohibited the court's exercise

[11] Accord, *Gordon* v. *United States*, *supra*, 344 U.S. at 418; *Upshaw* v. *United States*, *supra*, 335 U.S. at 414–415 (dissent); *Wolfle* v. *United States*, 291 U.S. 7, 13; *Funk* v. *United States*, *supra*, 290 U.S. at 374–375, 379, 382.

of any supervisory power it might otherwise have to suppress respondent's relevant and voluntary self-incriminating testimony. Then in Part II, *infra*, we show that, even assuming that those two Acts are not controlling here, the court abused its discretion in invoking its supervisory power to exclude respondent's grand jury testimony.

There was "no manifestly improper conduct by federal officials" (*Lopez* v. *United States*, *supra*, 373 U.S. at 440) in this case, and suppression of respondent's allegedly perjurious testimony would have been an inappropriate remedy even if the warnings procedure followed by the government had violated her constitutional privilege against self-incrimination (*United States* v. *Wong*, No. 74–635, decided May 23, 1977; *United States* v. *Mandujano*, 425 U.S. 564). The court acknowledged that the lack of uniformity occasioned by the Strike Force attorney's failure to give respondent a "target" warning violated none of respondent's rights, and in these circumstances the court's use of supervisory power in effect to immunize her from trial on criminal charges was improper. Moreover, the court's decision to punish the government because one of its attorneys, unwittingly and without bad faith, violated a practice of the United States Attorney's office will be more likely to discourage prosecutors from voluntarily adopting policies that confer benefits on suspects or defendants in criminal cases than it will be to enforce uniform prosecutorial practices.

ARGUMENT

I

THE COURT OF APPEALS HAD NO SUPERVISORY POWER TO SUPPRESS RESPONDENT'S GRAND JURY TESTIMONY

A. EXCLUSION OF RESPONDENT'S GRAND JURY TESTIMONY WAS CONTRARY TO RULE 402 OF THE FEDERAL RULES OF EVIDENCE

Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Respondent's grand jury testimony was relevant to both the charge of perjury and the charge of transmitting a threat in interstate commerce. The court of appeals did not rule that the Constitution, any Act of Congress, any other Rule of Evidence, or any rule promulgated by this Court pursuant to statutory authority required the exclusion of that testimony. Her testimony therefore was admissible, and in our view the court of appeals had no power to suppress it.

The court's contrary ruling was based on its erroneous belief that the enactment of the Federal Rules of Evidence had no impact on the judiciary's supervisory powers (Pet. App. 11A). Prior to the

enactment of those Rules,[12] questions of admissibility of evidence in criminal trials in the federal courts were governed by Congress' codification, in former Rule 26 of the Federal Rules of Criminal Procedure, of this Court's decision in *Funk* v. *United States*, 290 U.S. 371." That Rule provided:

> * * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

To the extent that the federal courts' supervisory power has been equated to the power to declare common law rules of evidence (*e.g., Elkins* v. *United States, supra*, 364 U.S. at 216)—a power that "exists only in the absence of a relevant Act of Congress" (*Palermo* v. *United States, supra*, 360 U.S. at 353, n. 11)—the new federal rules abrogated it entirely. The purpose of the legislation was "to provide a uniform code of evidence for use in Federal courts, and to

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[12] The Rules were initially promulgated by this Court pursuant to its rulemaking power under the Rules Enabling Acts (18 U.S.C. 3771, 3772, 3402; 28 U.S.C. 2072, 2075). They were enacted into law as an Act of Congress (Pub. L. 93-595, 88 Stat. 1926) and became effective on July 1, 1975. For a review of the background of the Rules, see Wright and Graham, *Federal Practice and Procedure; Evidence* §§ 5001-5007, pp. 1-113 (1977).

[13] See the Advisory Committee Note to former Rule 26, 8A Moore's *Federal Practice* ¶26.01[2] (1976).

make conforming amendments to * * * the Federal Rules of Criminal Procedure." H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 1 (1973). One of those conforming amendments was the deletion of the above-quoted sentence from Rule 26. In short, with the pasage of the Rules of Evidence, the federal courts' supervisory power to elucidate the common law of evidence "in the light of reason and experience" came to an end.

It is true that the scope of the judiciary's supervisory power has not been strictly limited to formulating common law rules of evidence (see pp. 10-11 and n. 9, *supra*). Contrary to the court of appeals' implicit conclusion, however, it does not follow that, unless Congress clearly manifests an intent to restrict or nullify particular judicial supervisory powers, any statute that it passes to govern practice in the federal courts can be disregarded in favor of an inconsistent exercise of such powers.

Congress chose the language of Rule 402 with care: relevant evidence is to be excluded solely in those cases where exclusion is mandated "by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court *pursuant to statutory authority*" (emphasis added).[14] Having strictly limited this Court's ability to fashion

[14] The language "pursuant to statutory authority" did not appear in Rule 402 when it was first submitted to Congress. It was added to make it clear that Congress henceforth considered itself the sole source of authority for the promulgation or amendment of uniform rules of evidence for the federal courts. See H.R. Rep. No. 93-650, *supra*, at 7.

rules excluding otherwise relevant evidence, Congress plainly could not have intended to allow the courts of appeals an unfettered "supervisory power" to exclude evidence that the statute declares is admissible.[15]

B. RESPONDENT'S GRAND JURY TESTIMONY WAS A "SELF-INCRIMINATING STATEMENT" AND WAS THEREFORE ADMISSIBLE UNDER 18 U.S.C. 3501

Section 3501(a) of Title 18 provides that in any criminal prosecution in the federal courts a confession, which is defined to include "any self-incriminating statement" (Section 3501(e)), "*shall* be admissible in evidence if it is voluntarily given" (emphasis added). Congress passed that statute as part of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 210, principally in order to counteract what it perceived to be the deleterious impact on

[15] A colloquy between Congressmen Smith and Hutchinson during the floor debates on the Rules clearly makes the point (120 Cong. Rec. 1413-1414 (1974)):

"Mr. HUTCHINSON. But so far as the codification itself is concerned it would not be possible legally for a judge in any court to provide a rule of evidence at variance with this modification. So far as the codification reaches, it will be uniform throughout the country.

"Mr. SMITH of New York. I would say to the gentleman that is correct. In many of the rules that we have proposed, the judges have a certain amount of discretion as to whether to allow evidence in or out depending upon the cases as outlined in the codified rule.

"It would be my answer that a judge would not be able to hold adversely to the codified rules of evidence and that the only way those could be changed would be through further legislation. In the event that some rule turns out in practice to be one that reasonable people would agree ought to be changed, it would be subject to further legislation for amendment."

law enforcement of this Court's exclusion of confessions in *McNabb* v. *United States*, 318 U.S. 332, *Mallory* v. *United States*, 354 U.S. 449, and *Miranda* v. *Arizona*, 384 U.S. 436. See S. Rep. No. 1097, 90th Cong., 2d Sess. 37–51 (1968);[16] *United States* v. *Marrero*, 450 F. 2d 373 (C.A. 2); *United States* v. *Halbert*, 436 F. 2d 1226 (C.A. 9). Noting that "[v]oluntary confessions have been admissible in evidence since the early days of our Republic" and that "[t]hese inculpatory statements have long been recognized as strong and convincing evidence—often called the best evidence of guilt" (S. Rep. No. 1097, *supra*, at 38), Congress intended Section 3501 to assure "[t]he traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants * * *" (*id.* at 37).

The court of appeals ruled that Section 3501 is inapplicable to this case because, in its view (Pet. App. 10A–11A), respondent's allegedly perjurious denial of the threatening telephone call was neither a "confession" nor a "self-incriminating statement." We concede that respondent's testimony was not a confession in the commonly understood sense of an advertent, public declaration to the authorities by the accused of his or her own wrongdoing. The expression "self-in-

[16] Since *McNabb* was decided by the Court in the exercise of its supervisory powers (see 318 U.S. at 341–342), Congress was confident of its authority to override that decision. See S. Rep. No. 1097, *supra*, at 40. Congress was less certain of its ability to override *Miranda*. See *id.* at 46–47, 50–51.

criminating statement," however, has a far broader meaning than a "confession."[17] For example, in contrast to confessions, "self-incriminating statements" are not limited to those that the speaker recognizes to be incriminating at the time they are made. Respondent's false denials were in our view plainly "incriminatory," and they do not escape the reach of Section 3501 simply because they also happened to constitute the *corpus delicti* of her alleged perjury. Indeed, it is difficult to conceive of a statement more self-incriminating than a lie told under oath to an official who knows the truth of the matter.

The broad construction of "self-incriminating statement" that we urge is in keeping with Congress' intent in enacting Section 3501. As we noted above, that statute was passed in response to this Court's decision in *Miranda* v. *Arizona*, *supra*, which held that, absent effective warnings regarding the Fifth Amendment privilege against compelled self-incrimination, any statements made by an accused during custodial interrogation would be inadmissible at trial. The Court there refused to draw any distinction "between inculpatory statements and statements alleged to be merely 'exculpatory'" (384 U.S. at 477), for it was of the view that relevant statements made by the

[17] Webster's *Third New International Dictionary* (1961) defines "self-incrimination" to mean "the giving of evidence or answering questions the tendency of which would be to subject one to a criminal prosecution."

accused that the government would use to discharge its burden of proving guilt "are incriminating in any meaningful sense of the word" (*ibid.*). Congress' use of the term "self-incriminating" in Section 3501 should be given a meaning as broad as the term was given in *Miranda;* there is no reason why a statement should be considered "self-incriminating" for purposes of *Miranda's* exclusionary rule but not "self-incriminating" for purposes of Section 3501's rule of admissibility.[18]

The Third Circuit has recognized that the courts have no supervisory power to suppress voluntary confessions in light of Section 3501. In *United States* v. *Crook,* 502 F. 2d 1378 (C.A. 3), certiorari denied, 419 U.S. 1123, the court held that a defendant's voluntary waiver of counsel prior to questioning by federal agents who knew he was represented by counsel on pending, unrelated charges did not contravene *Massiah* v. *United States,* 377 U.S. 201. The court then

[18] Respondent's denials of guilt not only were perjurious but also were evidence of her guilt on the charge against her of transmitting in interstate commerce a threat to injure (see note 4, *supra*), since false exculpatory statements are circumstantial evidence of guilty consciousness. See, *e.g.*, *United States* v. *Kahan*, 415 U.S. 239; *Wilson* v. *United States*, 162 U.S. 613, 620–621; *United States* v. *Parness*, 503 F. 2d 430, 438 (C.A. 2), certiorari denied, 419 U.S. 1105; *United States* v. *Merrill*, 484 F. 2d 168, 170 (C.A. 8), certiorari denied, 414 U.S. 1077; *United States* v. *Tager*, 481 F. 2d 97, 100 (C.A. 10), certiorari denied, 415 U.S. 914; *United States* v. *Lompres*, 472 F. 2d 860, 863 (C.A. 7), certiorari denied, 411 U.S. 965. At the very least, then, the court of appeals erred in ordering respondent's grand jury testimony suppressed as to this count.

considered and rejected the possibility of exercising supervisory powers to create a rule adopting the prohibition contained in the American Bar Association's Code of Professional Responsibility[19] against interrogation of a defendant in the absence of his or her counsel. The court noted (502 F.2d at 1380) that the Code provisions were enforceable "only under our supervisory powers," which are "subject to the control of Congress." Since Congress had decreed that voluntary confessions shall be admitted, the court recognized its lack of authority to formulate a conflicting evidentiary rule. "We cannot," said the court (*id.* at 1381), "in exercising merely supervisory powers, disregard the congressional mandate of 18 U.S.C. § 3501(a)."

The court below attempted to distinguish *Crook* on the asserted ground that the Third Circuit's holding that the defendant's constitutional rights had not been violated made the subsequent discussion of Section 3501 and its limitation on the exercise of judicial supervisory power mere dictum (Pet. App. 11A–12A). But the court's description of *Crook* only highlights its resemblance to this case, where the court also found that respondent's statements were secured without violation of any of her constitutional rights. The court below further attempted to distinguish *Crook* as involving "a real 'confession'" (*id.* at 12A), but, as we have shown, the distinction between inculpatory

[19] D.R. 7-104(A)(1) (Final Draft, July 1, 1969).

and facially exculpatory incriminating statements is not material for purposes of Section 3501.

The Third Circuit followed *Crook* in *United States* v. *DiGilio,* 538 F. 2d 972 (C.A. 3), certiorari denied, 429 U.S. 1038. There the court ruled (538 F. 2d at 985) that the government had misused grand jury subpoenas to facilitate investigatory interrogation of defendants outside the grand jury's presence; nevertheless, it held that under Section 3501 it "lacked any supervisory authority to suppress" the defendant's statements unless they were given involuntarily. The court below sought to distinguish *DiGilio* on the sole ground (Pet. App. 12A, n. 12) that it "involved no question whether defendants are treated differently by the Strike Force than the normal practice would require." We fail to see how this factual difference between the two cases can make Section 3501 applicable to one but not the other.[20] Absent a determination that respondent's grand jury testimony was not voluntarily

[20] See also *United States* v. *Anderson,* 352 F. Supp. 33, 37, n. 10 (D.D.C.), affirmed, 490 F. 2d 785 (C.A. D.C.), in which the district court ruled that, where no constitutional violation had tainted a lineup procedure, 18 U.S.C. 3502 precluded the use of the court's supervisory power to exclude identification testimony by an eyewitness to the crime. That statute, which, like Section 3501, was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, provides:

"The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried *shall be admissible* in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States." [Emphasis added.]

given, Section 3501 governs, and the court below had no power—supervisory or otherwise—to suppress it."[21]

II

IF THE COURT OF APPEALS HAS SUPERVISORY POWER TO SUPPRESS EVIDENCE SUCH AS RESPONDENT'S TESTIMONY, IT ABUSED ITS DISCRETION IN EXERCISING IT IN THIS CASE

1. If, contrary to the foregoing arguments, Rule 402 and Section 3501 do not preclude the exercise by the court of appeals of any supervisory power it may previously have possessed to suppress respondent's grand jury testimony in this case, then the propriety of the court's exercise of that power must be tested according to the standards enunciated in *Lopez* v. *United States,* 373 U.S. 427 (decided prior to enactment of both statutes discussed above). There

[21] The court of appeals noted (Pet. App. 11A) that Section 3501(b) instructs the district court in determining voluntariness to consider all of the circumstances surrounding the giving of any statement by the defendant, including whether the defendant at the time "knew the nature of the offense with which he was charged or * * * suspected." The court then said (*ibid.*): "There is no evidence that Mrs. Jacobs had such knowledge." We take this remark to be something other than a ruling by the court that respondent's allegedly perjurious denial was involuntary. Whether she knew the nature of the offenses of which she was suspected, and what effect the state of her knowledge may have had on the voluntariness of her grand jury testimony, were factual issues that were not raised before or passed upon by the district court and that the court of appeals presumably was not attempting to resolve in the first instance.

the Court refused to suppress lawfully obtained recordings of a defendant's face-to-face conversations with an Internal Revenue Service agent whom he had attempted to bribe. The Court observed that a court's supervisory power "to refuse to receive material evidence is a power that must be sparingly exercised" (*id.* at 440). In that case—as in this one—there was "no manifestly improper conduct by federal officials," and the Court ruled that the exercise of its supervisory powers to suppress the recordings "would be wholly unwarranted" (*ibid.*). The Court continued (*ibid.*):

> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

See also *United States* v. *Nixon,* 418 U.S. 683, 709; *Elkins* v. *United States, supra,* 364 U.S. at 216; *id.* at 234 (Franfurter, *J.,* dissenting); *Funk* v. *United States, supra,* 290 U.S. at 381; *United States* v. *Grimes,* 438 F. 2d 395 (C.A. 6), certiorari denied, 402 U.S. 989; *United States* v. *Jones,* 433 F. 2d 1176, 1181–1182 (C.A.D.C.), certiorari denied, 402 U.S. 950; *United States* v. *Quarles,* 387 F. 2d 551, 555–556 (C.A. 4), certiorari denied, 391 U.S. 922.

To the cautionary principles of *Lopez* must be added this Court's decisions in *United State* v. *Mandujano,* 425 U.S. 564, and *United States* v. *Wong,* No. 74–635, decided May 23, 1977. These cases established that, whatever warnings regarding the constitutional privilege against self-incrimination might be required to be given to "putative defendants" in general, the absence of warnings is immaterial in a perjury prosecution because " '[o]ur legal system provides methods for challenging the Government's right to ask questions—lying is not one of them' " (*United States* v. *Mandujano, supra,* plurality opinion, 425 U.S. at 577; concurring opinion of Mr. Justice Brennan, *id.* at 585; concurring opinion of Mr. Justice Stewart, *id.* at 609; quoting from *Bryson* v. *United States,* 396 U.S. 64, 72). If a possible violation of a grand jury witness' constitutional rights is insufficient to justify suppression of allegedly perjurious testimony, it would seem especially difficult to justify the use of supervisory powers to impose the same sanction where none of the witness' rights has been violated. In acting as it did, the court below has overridden both the principles of *Lopez* and the policies that sustained the perjury prosecutions in *Bryson, Mandujano,* and *Wong.* Cf. *Lego* v. *Twomey,* 404 U.S. 477, 488, n. 16.

The court erroneously believed that its result was justified by the lack of uniformity in prosecutorial practice created by the Strike Force attorney's failure to advise respondent of her status as a potential de-

fendant."[22] The court did not rule that any of respondent's rights had been violated (Pet. App. 4A), and it acknowledged that the government could legitimately achieve uniformity by adopting a practice of never giving "target" warnings in any case (*id.* at 3A, 6A, 14A). It believed that suppression was nevertheless appropriate "to let our citizens know that equal justice is available to all" (*id.* at 6A).

We do not question the value of consistency in prosecutorial decisionmaking. But nonuniformity in prosecutorial practice—provided it offends no statutory or constitutional proscription—has never, to our knowledge, been considered a sufficient cause to terminate a prosecution. The Executive Branch has broad discretion to carry out its constitutional mandate to "take Care that the Laws be faithfully executed." United States Constitution, Article II, Section 3. See *United States* v. *Nixon*, 418 U.S. 683, 693; *United States* v. *Cox*, 342 F. 2d 167, 171 (C.A. 5), certiorari denied, 381 U.S. 935; see generally *Nixon* v. *Administrator of General Services*, No. 75–1605, decided June 28, 1977, slip op. 13–15. This discretion, which, "ordinarily at least, is not subject to judicial review" (*Weisberg* v. *Departmnt of Justice*, 489 F. 2d 1195, 1201 (C.A. D.C.) (*en banc*), certiorari denied, 416 U.S. 993), embraces such vital matters as plea bar-

[22] It is now settled that the Constitution does not require that "target" warnings be given to potential defendants called to testify before the grand jury. *United States* v. *Washington*, No. 74–1106, decided May 23, 1977.

gaining, sentencing recommendations, grants of testimonial immunity, and even the selective enforcement of criminal laws, so long as the prosecutor's decisionmaking is not based upon impermissible considerations "such as race, religion, or other arbitrary classification." *Oyler* v. *Boles*, 368 U.S. 448, 456. While *Oyler* was a state case, and the Court thus was not addressing itself to the issue in the context of supervisory power, the principles it enunciated have been consistently applied in federal cases as well. See, *e.g.*, *City of Milwaukee* v. *Saxbe*, 546 F. 2d 693, 706 (C.A. 7); *United States* v. *Jones*, 527 F. 2d 817, 820 (C.A.D.C.); *United States* v. *Cowan*, 524 F. 2d 504, 507–509 (C.A. 5), certiorari denied, 425 U.S. 971; *United States* v. *Mann*, 517 F. 2d 259, 271 (C.A. 5), certiorari denied, 423 U.S. 1087; *United States* v. *Swanson*, 509 F. 2d 1205, 1208 (C.A. 8); *United States* v. *Raven*, 500 F. 2d 728, 733, n. 14 (C.A. 5), certiorari denied, 419 U.S. 1124; *United States* v. *Brown*, 481 F. 2d 1035, 1042–1043 (C.A. 8); *United States* v. *Jones*, 438 F. 2d 461, 467–468 (C.A. 7).

In *Newman* v. *United States*, 382 F. 2d 479, 481–482 (C.A. D.C.), Chief Justice (then Judge) Burger stated the position we urge:

> An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the Court for the manner of his conduct of a case, *i.e.*, his demeanor, deportment and ethical conduct; but

> in his second capacity, as agent and attorney for the Executive, he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment. * * *
>
> To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task; of course this concept would negate discretion. * * *
>
> It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths; and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors.

"Target" warnings are not constitutionally (or statutorily) required (*United States* v. *Washington, supra*), and therefore the determination whether or not to give them falls within the discretionary prosecutorial function. There is no suggestion here that the Strike Force Attorney's decision not to warn respondent of her status as a potential defendant resulted from discriminatory or otherwise impermissible motives, nor even that he was aware that his actions were contrary to any policy of the United States Attorney. There has been "no manifestly improper conduct by federal officials" (*Lopez* v. *United States, supra,* 373 U.S. at 440) in this case, and none of

respondent's rights has been abridged. Yet the court of appeals in effect has pardoned petitioner,[22] acting out of an abstract interest in uniformity of prosecutorial performance and in plain disregard of this Court's twice-repeated caution (given in the context of entrapment cases but no less relevant here) that the federal judiciary does not sit to exercise "'a 'chancellor's foot' veto over law enforcement practices of which it d[oes] not approve." *Hampton* v. *United States,* 425 U.S. 484, 490 (plurality opinion), quoting from *United States* v. *Russell,* 411 U.S. 423, 435.[23]

2. It makes no difference that the lack of uniformity here was caused by the Strike Force Attorney's failure to follow a general policy already in existence.

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[22] The court of appeals' attempt to support its ruling that the government in this case is not "entitled to the luxury of a perjury count" (Pet. App. 7A) by pointing out that respondent remains subject to prosecution for transmitting a threat in interstate commerce (*ibid.; id.* at 14A) is in our view unavailing. The respondent may have committed and may be convicted and punished for another crime does not mean that the court of appeals has avoided "allowing a possibly guilty person to escape" (*id.* at 6A–7A) punishment for the crime of perjury. In *United States* v. *Mandujano, supra*, the pendency of charges for crimes other than perjury was irrelevant (see 425 U.S. at 569, n. 2); it should have been equally irrelevant here.

[23] Cf. *United States* v. *Lovasco*, No. 75–1844, decided June 9, 1977, slip op. 7 ("Judges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions of fairness and to 'disregard the limits that bind judges in their judicial function.' *Rochin* v. *California* [, 342 U.S. 165, 173]"); *McNabb* v. *United States*, *supra*, 318 U.S. at 347; *Rea* v. *United States*, 350 U.S. 214, 218 (Harlan, *J.*, dissenting).

The nonobservance of a discernible standard that is intended to govern prosecutorial decisionmaking at any of the numerous stages of the criminal process where discretion must be exercised does not, in our view, warrant dismissal of a prosecution if none of the defendant's rights have been violated. See *Sullivan* v. *United States*, 348 U.S. 170, 173–174.

United States v. *Leahey*, 434 F. 2d 7 (C.A. 1), and *United States* v. *Heffner*, 420 F. 2d 809 (C.A. 4), cited by the court of appeals in support of its result (Pet. App. 5A–6A), were in our view wrongly decided, for the reasons suggested by Judge Friendly in another decision of the Second Circuit not cited by the court below. See *United States* v. *Leonard*, 524 F. 2d 1076, 1089, certiorari denied, 425 U.S. 958.[25] It is unnecessary, however, for the Court in this case to pass upon the correctness of *Leahey* and *Heffner*, for they are distinguishable. Those decisions overturned convictions because the government had introduced into evidence self-incriminating statements made by the defendants during noncustodial interviews with Internal Revenue Service Agents who, contrary to a generally available statement of policy published by the IRS, had failed to precede the interview with *Miranda* warnings. In the present case, by contrast, the informal practice of giving "target"

[25] *Leahey* and *Heffner* were followed in *United States* v. *Sourapas*, 515 F. 2d 295 (C.A. 9), and *United States* v. *Caceres*, 545 F. 2d 1182 (C.A. 9), pending on petition for a writ of certiorari (No. 76-1309). In our petition in *Caceres* we have outlined our reasons for believing this line of decisions to be incorrect.

warnings was neither published nor generally available; indeed, it was discernible to the court of appeals only upon a poll by the court of all of the United States Attorneys in the circuit, each of whom was free under Department of Justice policy to adopt such practice in this regard (including a practice of proceeding on a case-by-case basis) as he wished.[26] Thus, even assuming that *Leahey* and *Heffner* correctly state the law, those decisions are not authority for holding the government to an informal practice that exists only by virtue of its coincidental adoption by six United States Attorneys.[27]

[26] The "guidelines" to which the court of appeals referred (Pet. App. 5A) are those promulgated by the Attorney General to govern the relationship between Strike Force attorneys (who operate under a commission from the Attorney General pursuant to 28 U.S.C. 515(a)) and the United States Attorneys. Those guidelines provide generally that in grand jury proceedings the former "shall * * * operate under the direction of" the latter. See Office of the Attorney General, Order No. 431–70 (reprinted in *In re Subpoena of Persico*, 522 F. 2d 41, 68–71 (C.A. 2)). The guidelines do not require (or even mention) "target" warnings. Indeed, while the Department of Justice is considering a revision of the United States Attorneys Manual to require that "target" warnings be given as a matter of course, there is no currently governing Department policy regarding such warnings, and although in most cases most United States Attorneys apparently give them, the practice appears to vary among and sometimes even within United States Attorneys' offices.

[27] *Leahey* is also distinguishable from the present case because it was based on a finding that the defendant's due process rights had been violated by the interrogation (see 434 F. 2d at 10–11), whereas the court below specifically disavowed any constitutional basis for its decision. Moreover, *Leahey* and like decisions did not involve prosecutions for perjury.

3. The other cases relied upon by the court of appeals also do not support its result. Indeed, *United States* v. *D'Angiolillo*, 340 F. 2d 453 (C.A. 2), certiorari denied, 380 U.S. 955, favors our position. There, flagrantly unlawful searches were made by federal agents, but no evidence seized during those searches was introduced at trial. The court, recognizing that in the absence of a violation of any of the defendant's rights at trial the matter was principally one for the Executive Branch, refused to exercise its supervisory power to dismiss the indictment and instead directed the United States Attorney to bring the unlawful searches to the attention of the superiors of the agents involved (*id.* at 456). In *United States* v. *Toscanino*, 500 F. 2d 267, 276 (C.A. 2), the court, refusing to follow *Frisbie* v. *Collins*, 342 U.S. 519, stated that it could, in the exercise of supervisory powers, direct the district court to refuse to accept jurisdiction over a defendant if it were shown that his presence was secured by patently illegal conduct by federal agents. In *United States* v. *Estepa*, 471 F. 2d 1132, 1136 (C.A. 2), the court exercised its supervisory powers to reverse a conviction and order an indictment dismissed because the United States Attorney had failed to heed numerous admonitions from the court regarding the unnecessary reliance on hearsay evidence before the grand jury and the desirability of apprising the grand jury of the hearsay nature of the evidence presented.

Without debating the propriety of the claim of supervisory power in *Toscanino* or its exercise in *Estepa*,[28] it is enough to say that in the present case the government neither broke the law nor disregarded repeatedly announced judicial preferences.[29]

[28] We disagree with the court of appeals that in this case it "did not go as far as [it] did in" *Estepa*. The government was free to reindict the defendants in *Estepa* upon presentation of direct evidence to the grand jury. See 471 F. 2d at 1137. Here respondent escapes prosecution for perjury.

[29] The *Allen* charge cases cited by the court below (Pet. App. 10A) represent exercises by the courts of appeals of supervisory control over matters of judicial administration. See, *e.g.*, *United States* v. *Thomas*, 449 F.2d 1177, 1186–1187 (C.A. D.C.) ("We have predicated our decision on the needs of judicial administration * * *."). The traditionally broad supervisory powers of the courts of appeals over the conduct of the district courts (see *Cupp* v. *Naughten*, 414 U.S. 141, 146; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260)—powers that we do not challenge—are largely irrelevant to the question whether and under what circumstances the courts of appeals possess and should exercise like powers over conduct of the Executive Branch occurring outside the context of a trial.

United States v. *Dooling*, 406 F. 2d 192 (C.A. 2), also cited by the court below (Pet. App. 10A), is another example of court of appeals control over the district court. That case, rather than supporting the disruption of criminal prosecutions through the exercise of broad and vaguely defined supervisory powers over prosecutorial conduct, reflects the limited nature of the judicial power to interfere with criminal prosecutions. There the court of appeals by mandamus directed the district court not to enter an order dismissing an indictment after the jury had returned a verdict of guilty. The court noted that the proposed dismissal was not based upon any power conferred upon the district court by the Federal Rules of Criminal Procedure (406 F. 2d at 196) or upon a finding by the district court that any of the defendants' rights had been violated, but rather upon the district court's "vague and unsubstantiated doubts" about the fairness of the trial (*id.* at 197). In these circumstances the court of appeals ruled that the proposed dismissal "would interfere seriously with the proper prosecution of criminal cases in the federal courts" (*id.* at 198) and exercised its supervisory power to prevent "gross disruption in the

However abstractly meritorious the court of appeals' goal of "bring[ing] the Strike Force and the United States Attorney to closer harmony" (Pet. App. 14A), it did not justify the court's use of its supervisory power to place respondent beyond the reach of prosecution for perjury simply because of an isolated departure from an informal prosecutorial practice not required by the Constitution, statute, or rule.

4. The premise of the court of appeals' use of the "didactic" sanction of suppression was that it would foster uniformity of prosecutorial practice. In our view, however, the court's decision will tend less to encourage uniform prosecutorial practice than to discourage adoption by the Executive Branch of formal policies or informal practices conferring upon suspects or defendants benefits not required by the Constitution or statute.[30] Occa-

administration of criminal justice" (*ibid.*). In the present case, by contrast, the court of appeals itself has "interfere[d] seriously with the proper prosecution" of a criminal case.

[30] There are many examples of such voluntarily adopted practices, some meant to be of uniform application, others meant to be effected on a case-by-case basis: interrogations of subjects of criminal tax investigations are preceded by advice of the nature of the inquiry and by administration of modified *Miranda* warnings, even though the questioning is noncustodial; except in special cases, individuals tried for state offenses are not subjected to federal prosecution for offenses arising from the same transaction, although there would be no double jeopardy bar to such prosecutions; defense attorneys in criminal cases are often permitted access to prosecutorial files, although there may be no constitutional or statutory obligation to disclose the materials, and are supplied with Jencks Act material in advance of the time disclosure is required by statute; and grand jury witnesses are given

sional departures from such policies and practices are virtually inevitable, given the number of prosecutors employed by the government and the volume and complexity of criminal litigation it is their duty to conduct. The remedy for such departures is in our view a matter for the Executive Branch. When the judiciary imposes sanctions that the executive believes to be excessively harsh—as in this case—then the result must be to prompt a reevaluation of the benefits and costs that attach to the policy in question. We do not suggest that the decision below will result in wholesale repudiation of policies favorable to suspects that have heretofore been voluntarily adopted by the government, but it will tend in some degree to encourage *ad hoc* prosecutorial practices rather than implementation of otherwise desirable across-the-board policies.

Moreover, the court of appeals' expansive view of its power to control what we consider to be discretionary prosecutorial conduct may add significantly to the burdens of the judiciary. Each of the many federal prosecutors is constantly called upon to make discretionary decisions in the discharge of his or her responsibilities. Charges of nonuniform practice will be relatively easy to make, and, if they are cognizable,

advice of rights or "target" warnings even though such warnings are not compulsory.

Comparable practices exist in the civil context. For example, prisoners facing possible transfer to another institution may be afforded an opportunity for a hearing that due process does not require; and government documents are disclosed even when not required by the Freedom of Information Act.

then the courts are likely to become embroiled in difficult, time-consuming and, we submit, inappropriate oversight of the day-to-day operations of the United States Attorneys and the Department of Justice.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977
No. 76-1193

UNITED STATES OF AMERICA,

Petitioner,

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER",

Respondent.

BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ESTELLE JACOBS, A/K/A "MRS. KRAMER",

Respondent.

BRIEF IN OPPOSITION ON
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The United States of America on writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals on remand (Pet. App. A, pp. 1A-14A) is reported at 547 F. 2d 772. The first opinion of the Court of Appeals (Pet. App. B, pp. 15A-22A) is reported at 531 F. 2d 87. The opinion of the District Court (Pet. App. E, pp. 26A-32A) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1976. On January 21, 1977, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including February 28, 1977. The petition was filed on that date and was granted on May 31, 1977 (A. 85). The jurisdiction of this Court rests upon

28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a Court of Appeals possesses and may exercise supervisory powers to insure fair and even-handed administration of criminal justice in the circuit, by suppressing a defendant's grand jury testimony on the ground that the Special Strike Force prosecutor did not follow uniform circuit practice to warn the witness that she was a targeted putative defendant, against whom the government had alleged indictable incriminating evidence. *

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*The Strike Force prosecutor sought and was granted express authority for appearing before the Grand Jury to present evidence in United States v. John Doe (Woods and Jacobs) prior to respondent's appearance before Grand Jury (A. 84).

STATEMENT

During May 1973 Respondent made telephone calls as part of her duties as an employee of a debt collection agency. Without her knowledge, the recipient of one of these calls from Respondent tape-recorded their conversation, during which Respondent allegedly made threatening statements (A. 5, 16-17, 60). On September 13, 1973, Respondent had been questioned by the Federal Bureau of Investigation about these alleged threatening telephone calls (Pet. App. 16A-17A).

On June 10, 1974, Respondent appeared before a Grand Jury in the Eastern District of New York.

Respondent, at the Grand Jury, was not given the complete Miranda warnings. Respondent's Grand Jury testimony on June

10, 1974 was the predicate of the perjury count of the indictment (A. 23-24).

Prior to her grand jury appearance, Respondent was not told that she had a right to remain silent before the grand jury. She was not told that counsel would be provided for her if she were unable to bear the expense herself. Furthermore, she was not told that she was a putative (target) defendant against whom the government held significant incriminating evidence, particularly the tape-recording of the allegedly threatening telephone conversation. Respondent was unrepresented at the time of her grand jury testimony, stating that she did not feel that she was in need of counsel (A. 2-4).

During the course of her grand jury appearance, Respondent was questioned about the telephone conversation which had taken

place thirteen months earlier (A. 23-24). Respondent answered from memory questions propounded by the government attorney which were, unbeknownst to Respondent, allegedly based on a transcript of the recording of the conversation which was the subject of the grand jury inquiry. Respondent was indicted for perjury and transmitting in interstate commerce a communication containing a threat. [Violating 18 U.S.C. 1623, 875(c).]

Before trial, Respondent moved to suppress her grand jury testimony on the ground that the government's warning to her had been constitutionally inadequate. The District Court granted the motion to suppress Respondent's Grand Jury testimony, basing its decision on a due process analysis. The perjury charge was dismissed (Pet. App. E, pp. 26A-32A).

The Court of Appeals affirmed the decision of the District Court and held that Respondent's grand jury testimony was properly suppressed. The Court of Appeals did not, however, base its decision on fifth amendment self-incrimination and due process considerations. Instead, the Court of Appeals for the Second Circuit found that the government's act of questioning Respondent before the grand jury, without informing her that she was a putative (target) defendant, was not only outside the penumbra of fair play, but was also not in conformity with established uniform prosecutional practice in the circuit.*

---

*Upon learning that the government attorney who had questioned respondent before the grand jury -- a "Strike Force" attorney -- had not told her that she was a "target" of the investigation, the court directed its clerk to poll the six United States Attorneys in the Second Circuit to learn their practice in this

Basing its decision on the need to secure uniform and even-handed application of criminal procedure within the circuit, the Court of Appeals exercised its supervisory power and affirmed the suppression of the grand jury testimony and, therefore, the dismissal of the perjury count of the indictment (Pet. App. B, pp. 19A-22A).

On November 1, 1976, the Court granted Respondent's petition for a writ of certiorari (No. 75-1883), vacated the judgment of the Court of Appeals, and remanded for reconsideration in light of United States v.

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regard. Each replied that he customarily warns grand jury witnesses who are "putative defendants" of their status. This survey indicated to the court that respondent would have been warned that she was a "putative defendant" if she had been subpoenaed by the United States Attorney, yet "the Strike Force operating in the same district failed to give her such warning" (Pet. App. 21A).

Mandujano, 425 U.S. 564, 96 S.Ct. 1768, 48 L. Ed. 2d 212 (1976).

On remand, the Court of Appeals adhered to its earlier decision, stating it had anticipated and agreed with this Court's ruling in Mandujano and that its own ruling had not been based on constitutional grounds, but on its supervisory power and duty to avoid uneven justice in the circuit, resulting from the government's mere negligence or inattention to established practice and guidelines (Pet. App. 3A-6A).

The Court of Appeals rejected the government's arguments that its exercise of supervisory powers by suppression of testimony was barred by 18 U.S.C. 3501(a), Rule 402 of the Federal Rules of Evidence and stated that the sanction of suppression was ad hoc, salutory and appropriate.

THE COURT OF APPEALS HAD SUPERVISORY POWER TO SUPPRESS RESPONDENT'S GRAND JURY TESTIMONY AND IS NOT PRECLUDED BY 18 U.S.C. 3501(a) OR RULE 402 OF THE FEDERAL RULES OF EVIDENCE FROM EXERCISING SUCH INHERENT DISCRETION

1. In the decision under consideration here, the Court of Appeals decided to exercise its power to supervise the administration of criminal justice within the circuit to secure the goal of uniform and just criminal procedure. It cannot be denied that the federal courts possess such supervisory power. Cupp v. Naughten, 414 U.S. 141, 146, 94 S. Ct. 396, 400, 38 L. Ed. 2d 368 (1973); LaBuy v. Howes Leather Co., 352 U.S. 249, 259-60, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957); Burton v. United States, 483 F. 2d 1182 (9th Cir. 1973); United States v. Estepa, 471 F. 2d 1132, 432 (2nd Cir. 1972). The particular application of this power here, to

require that putative defendants be given fair warning of their actual status prior to appearing before a grand jury, conflicts with no law of Congress, decision of this Court or of any circuit court of appeals. What Petitioner seeks is, in effect, for this Court either to hold that the courts of appeal do not have power to supervise grand jury procedures or to substitute its own idea of desired procedure for that of the court below.

That the federal courts have power to supervise the administration of federal criminal justice is a fundamental tenet of long and uniform acceptance. This supervisory power may be exercised by suppression of otherwise relevant evidence for reasons not limited to application of only minimal constitutional guarantees. This principle has been accepted as basic since the decision of

this Court in McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943). The reasoning which underlies the exercise by any federal court of its power to supervise criminal justice was stated in that case:

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force . . . . Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.
>
> The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal

> prosecution. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance. (Citations omitted.) 318 U.S. at 340-341.

Particularly applicable to the issue presented here is the statement in McNabb that:

> The function of formulating rules of evidence in areas not governed by statute has always been one of the chief concerns of courts: "The rules of evidence on which we practise today have mostly grown up at the hands of the judges; and, except as they may be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped." J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) pp. 530-31. 318 U.S. at 341, n. 1.

The courts of appeal certainly believe that they possess power to supervise the administration of criminal justice within their respective circuits. This fact is amply illus-

trated by the statement of the Ninth Circuit in Burton v. United States, 483 F.2d 1182 (9th Cir. 1973):

> Finally, we conceive it to be our duty, exercising our supervisory power, to assure that there be the strictest compliance with the requirement of Rule 11. That this court has such supervisory power is hardly deniable. In La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), the United States Supreme Court held that "... supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." Id. at 259-260, 77 S.Ct. at 315. Moreover, this pronouncement by the Nation's supreme judicial authority has been reaffirmed by every Court of Appeals, including our own, that has confronted the issue. 483 F.2d at 1187.

Especially significant is the extraordinary recitation of authorities presented by the Burton court in support of its view.

The Second Circuit stated herein:

We exercised supervisory power in

> the limited area of the relationship between the Strike Force attorney and the United States Attorney under a fair inference from the Guidelines, though not as a generally applicable exclusionary rule. Although we have confirmed the right of Strike Force attorney to appear before the grand jury ... we are not committed by statute to allowing them to come into the Circuit to evade the rules and supervision of the United States Attorneys. We think it our duty to avoid uneven justice in the circuit .... supra, 547 F.2d at 774-775.

Of course, the power of federal courts to supervise the administration of criminal justice may be circumscribed by Congress, if that body decides to assert its authority in respect to a particular matter of criminal procedure. Congress has not acted in the manner of the supervisory suppression of testimony extracted from a witness appearing before a grand jury without having been apprised that the focus of the investigation is directed at the witness himself.

Petitioner propounds two general Acts of Congress relating to the admissibility of evidence and asserts that certain phrases of those acts, taken out of context, operate to void the well-recognized power of federal courts to supervise grand jury practice in their circuits. In support of its argument, Petitioner extracts from 18 U.S.C. §3501(a) the phrase: "shall be admissible in evidence if it is voluntarily given." That section, part of the Omnibus Crime Control and Safe Streets Act of 1968, is not applicable to this case, and was not, for this reason, relied on by the courts below. Its basic inapplicability is amply shown when the section from which the asserted phrase was taken is read in its entirety:

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as

> defined in subsection (c) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. 18 U.S.C. §3501(a) (emphasis added).

In fact, this statute was not intended to apply to situations such as is involved here. Subsection (c) of §3501 forms the operational core of the statute. It provides, in pertinent part:

> In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magis-

trate .... 18 U.S.C. §3501(c).

The legislative history of this particular statute was carefully examined in United States v. Halbert, 436 F.2d 1226 (9th Cir. 1970), where it was concluded:

> [I]t is obvious that the prime purpose of Congress in the enactment of §3501 was to ameliorate the effect of the decision in Mallory v. United States (1957), 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed. 2d 1479, to remove delay alone as a cause for rejecting admission into evidence of a confession and to make the voluntary character of the confession, the real test of its admissiblity. 436 F.2d at 1231.

In fact, resort to the legislative history of this provision clearly reveals that Congress did not intend the section to operate to prevent a court from exercising its supervisory power to secure the enforcement of criminal law by methods which fall within the penumbra of fair play. As is stated in Senate Report No. 1097, 90th Cong. 2d Sess. 1968:

> This title would restore the test for the admissiblity of confessions in criminal cases to that time-tested and well-founded standard of voluntariness. It would avoid the inflexible rule of excluding such statements solely on technical grounds such as delay or failure to warn the accused as to his rights to silence or to counsel. We have not nullified, however, the rights of defendants to the safeguards of federal law or the Constitution. On the contrary, we have provided a more reasonable rule in that the judge shall consider all the defendant's rights (speedy arraignment, silence, counsel, knowledge of offense charged) and their possible violation in deciding as to the voluntariness of the confession and thus its admissibility. U.S. Code Cong. & Admin. News 90th Cong., 2d Sess. and 2282 (1968) (emphasis added).

The disclaimer contained in subsection (d) of Section 3501 of the statute cannot, of course, be construed as a requirement that any "confession" must be admitted under all circumstances, as that subsection merely states that:

> Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention. 18 U.S.C. §3501(d).

The thrust of Petitioner's argument, therefore, is based on the citation of this non-applicable statutory enactment, and the even more general language of Rule 402 of the Federal Rules of Evidence. Petitioner asserts that, once Congress has used the phrase "admissible", the federal courts have lost the power to suppress evidence. That notion is, of course, not supported by analysis. The statutes cited do not mandate the admission of evidence in any and all circumstances. This fact is shown by the context of 18 U.S.C. §3501 in its entirety and is even more cogently illustrated by the fact that, while Rule 402

broadly proposes that "All relevant evidence is admissible ....," Rule 403 of the same Federal Rules of Evidence sets out a wide variety of factors which would call for the exclusion of such "admissible" evidence.

The Second Circuit stated that its decision was not grounded in derogation of Section 3501(a) or Rule 402, but rather for the limited purpose of preventing chaos in criminal law administration through the presence in the same district of two sets of procedure before the grand juries. United States v. Jacobs, 547 F.2d at 777 (2d Cir. 1977).

A good example of the accommodation of the supervisory power of the federal courts in matters of criminal justice -- particularly in respect to grand jury proceedings -- with specific enactments of Congress is provided in In re Grand Jury Proceedings, 486 F.2d 85

(3d Cir. 1973). There, the Third Circuit found that particular provisions of the Crime Control Act of 1970 did not tie the hands of the court with respect to procedures not covered by the particular statute. The court was free to use its inherent supervisory powers to secure grand jury procedures which would be consonent with considerations of fair play, not limited to the bare requirements of the Constitution. See also In re Grand Jury Proceedings, 507 F. 2d 963 (3d Cir. 1975), cert. denied, 421 U.S. 1015 (1975).

2. Petitioner asserts that a conflict exists between the decision in this case and that of the Third Circuit in United States v. Crook, 502 F. 2d 1378 (3d Cir. 1974), cert. denied, 419 U.S. 1123 (1975). No such conflict exists, as the only similarity between the cases is that each involves the issue of

the proper use of the court's supervisory power to suppress testimony. In United States v. Crook, the court found that a criminal defendant in custody had been given warnings in full compliance with the requirements of the Miranda decision and, hence, the fifth and sixth amendments. Section 3501(a) applied to control the question of the admissibility of a confession. That is not the situation presented here. The holding of the Third Circuit that a court cannot exercise supervisory power to suppress testimony in a case which falls squarely within the scope of a Congressional enactment presents no conflict with the decision of the Second Circuit to utilize supervisory powers in a situation to which no statute directly applies.

The powers of a federal court to supervise the administration of criminal

justice are not limited to enforcement of minimal constitutional rights. As was cogently stated in McNabb, supra, a federal court may develop standards of criminal procedure which more adequately guarantee fairness and justice than is secured by adherence to only the bare bones of constitutional protections. The courts of appeals have consistently acted in conformity with this power, as is illustrated by the decision in United States v. Cheramie, 520 F. 2d 325 (5th Cir. 1975). There, the court of appeals used its supervisory powers to require that the district courts limit their use of supplementary jury instructions in a manner more restrictive than would otherwise be required by the Constitution itself.

This principle has also been noted in support of the exercise of supervisory power

to require uniform conduct by the government in enforcing criminal sanctions. United States v. Leahey, 434 F. 2d 7 (1st Cir. 1970). That court correctly perceived that a federal court's supervisory power permits it to go beyond minimal constitutional requirements if that is necessary to assure "citizens' faith in the even-handed administration of laws ..." 434 F. 2d at 10.

The propriety of the decision of the court of appeals in this case is further illustrated by the fact that the governmental prosecuting agencies in the circuit have themselves established a uniform policy of informing grand jury witnesses that they are putative defendants. (Pet. App. 21A) The decision in this case served to protect this particular defendant from the consequences of a deviation from this uniform practice, which the court found to be outside

the penumbra of fair play.

Of course, the Second Circuit's decision here does not conflict with the decision of this Court in United States v. Mandujano, 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed. 2d 212 (1976). There, it was held that the fifth amendment privilege against self-incrimination did not require the suppression, in a prosecution for perjury, of false statements made to a grand jury, even though the defendant had not been given Miranda warnings when called before the grand jury as a putative defendant. The decision here is explicitly not based on the constitutional grounds which were rejected in Mandujano. The sole basis of the decision here was the court's perception that an unfair prosecutional tactic should be eliminated from the administration of criminal justice in the circuit by the exercise of supervisory powers. Ristiano v. Ross, 424 U.S. 589, 597 n.9 (1976).

The Mandujano case cannot be read as espousing a policy which would give support to a prosecutorial practice uniformly rejected by prosecuting attorneys in the circuit. See also United States v. Doss, 545 F.2d 548 (6th Cir. 1976).

THE SANCTION OF SUPPRESSION AND RESULTANT DISMISSAL OF PERJURY COUNT WAS PROPER EXERCISE OF COURT'S SUPERVISORY POWER

The Second Circuit's sanction of suppression was a proper exercise of supervision as a one-time sanction to encourage uniformity of practice between the Strike Force and the United States Attorney for the same district.

The Second Circuit stated that it was not assuming that an error of the prosecutor

in failing to give warnings in the grand jury would lead inexorably to the conclusion that the witness could not be prosecuted for perjury.

The Second Circuit in In Re Subpoena of Persico, 522 F. 2d 41 (2d Cir. 1975), had placed the Strike Force on notice of the requirement that it follow Second Circuit prosecutorial guidelines and practice.

The sanction is best explained in United States v. Estepa, 471 F. 2d at 1137 (2d Cir. 1972), when Judge Friendly said:

> ... a reversal with instructions to dismiss the indictment may help translate the assurances of the United States Attorneys into consistent performance by their assistants.

The court clearly stated that this was an ad hoc sanction properly within the parameters of the supervisory power of the Court.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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October, 1977